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United States 1328

Circuit Court of Appeals

For the Ninth Circuit. /

In the Matter of EARL N. McKINNEY, Bankrupt.

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, as Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Arizona.

FILED

JAN 13 1923

F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of EARL N. McKINNEY, Bankrupt.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

DAVID BENSHIMOL, Esq., Douglas, Arizona,
Attorney for William Cowan.

C. V. MANATT, Esq., Douglas, Arizona,
Attorney for John P. Cull, Trustee.

Debtor's Petition.

(Form No. 1.)

To the Honorable Judge of the District Court of
the United States for the District of Arizona.

The petition of Earl N. McKinney of Douglas, in
the County of Cochise, in the State and District of
Arizona by occupation Dairyman, respectfully rep-
resents:

That he has been a *bona fide* resident at a point
about three miles north of Douglas, Cochise County,
Arizona, for the greater portion of six months next
immediately preceding the filing of this petition at
Tucson, Pima County, Arizona, within said judicial
district; that he owes debts which he is unable to
pay in full; that he is willing to surrender all his
property for the benefit of his creditors except such
as is exempt by law, and desires to obtain the bene-
fit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and
verified by your petitioner's oath, contains a full
and true statement of all his debts, and (so far as
it is possible to ascertain) the names and places of

residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said acts.

WHEREFORE, your petitioner prays that he may be adjudged by the Court to be a bankrupt within the purview of said acts.

EARL N. McKINNEY,

Petitioner.

D. A. RICHARDSON,

Attorney for Petitioner.

United States of America,

County of Pima, District of Arizona,—ss.

I, Earl N. McKinney, the petitioning debtor mentioned and described [1*] in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

EARL N. McKINNEY,

Petitioner.

Subscribed and sworn to before me this 9th day of April, 1918.

My commission expires May 12th, 1920.

[Seal]

A. T. SMITH,

Notary Public.

*Page-number appearing at foot of page of original certified Transcript of Record.

SCHEDULE A (2).
CREDITORS HOLDING SECURITIES.

Amount.

Judgment in Superior Court of Cochise County, Arizona, which carries foreclosure of mortgage liens on all property listed in Schedules B (1) and B (2) in favor of Wm. Cowan of Tombstone, Arizona, this indebtedness was represented by several mortgages given for borrowed money ranging in dates from Jan. 21st, 1914, to May 10th, 1917, which moneys were borrowed by Earl N. McKinney individually, and contracted at Douglas, Arizona.	\$20401.68
Note of Six Hundred Dollars payable to Jacob Scheerer, of Douglas, Arizona, for amount due said Scheerer for his having paid a debt on which he had become a surety dated Dec. 22d, 1916, and due seven months after date drawing 10% interest, and secured by a second chattel mortgage on all of cattle mentioned in Schedule B (2)	755.00

\$21156.68

EARL N. McKINNEY,
Petitioner. [2]

SCHEDULE B.
STATEMENT OF ALL PROPERTY OF BANK-
RUPT.

SCHEDULE B (1).

REAL ESTATE.

Location and description of all real estate owned by debtor, or held by him. Incumbrances thereon, if any, and dates thereof. Statement of particulars relating thereto.

	Amount.
N.W. $\frac{1}{4}$ Sec. 31, Township 23, range 28, 159 acres	\$ 5,000.00
S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ NE. Sec. 29, Township 23, range 28, 160 acres ...	1,600.00
Lots 1 & 2 and S. $\frac{1}{2}$ N.E. $\frac{1}{4}$ Sec. 1, Town- ship 24, Range 27, containing 158 acres	1,600.00
S.W. $\frac{1}{4}$ Sec. 29, Township 23, Range 28, containing 160 acres	1,600.00
W. $\frac{1}{2}$ S.E. $\frac{1}{4}$ and E. $\frac{1}{2}$ S.W. $\frac{1}{4}$ Sec. 30, Township 23, Range 28, containing 160 acres	1,000.00
All of the above lands situated in Cochise County, Arizona, and are subject to a judgment lien in favor of Wm. Cowan of Tombstone, Arizona, for the sum of \$20,341.68.	

In addition to the above I have a lease from the state of Arizona on Sec. 36, Township 22 S. Range 26 E. G. & S. R. meridian. The improvements thereon being covered by the Judgment mentioned.

Total	\$10,800.00
EARL N. McKINNEY,	
Petitioner. [3]	

SCHEDULE B. (2).

Personal Property.

Dollars/Cents

A. Cash on hand

None

B. Bills of exchange, promissory notes, or security of any description (each to be set out separately).

none

C. Stock in trade in business of at of the value of

none

D. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.:

none

Household goods \$150.00

Personal apparel 75.00

E. Books, prints and pictures, viz.:

none

F. Horses, cows, sheep and other animals (with number of each), viz.:

100 Dairy cows worth \$125.00 each . . . \$12500.00
 100 head *young* dairy cattle 5000.00
 12 head horses and mules 800.00

Now in the possession of Wm. Cowan near Douglas, Arizona.

G. Carriages and other vehicles, viz.:

Three wogans \$175.00
 one truck 200.00
 one buggy 25.00

Now in possession of Wm. Cowan near Douglas, Arizona.

H. Farming stock and implements of husbandry, viz.:

Two sets of harness 45.00
 Plow, mowing machine and rake . . . 175.00

Now in possession of Wm. Cowan near Douglas, Arizona.

I. Shipping and shares in vessels, viz.:

none

K. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated, viz.:	Dairy machinery, bottles, milk-cans and tools used in operating dairy.....	500.00
L. Patent, copyrights and trademarks, viz.:	Now in possession of Wm. Cowan near Douglas, Arizona.	
M. Goods or personal property of any other description, with the place where each is situated, viz.:	none	\$19,645.00
	none	

EARL N. MCKINNEY,
Petitioner. [4]

SUMMARY OF DEBTS AND ASSETS.

Dollars/Cents

Schedule A	1.	(1) Taxes and debts due the United States	
	1.	(2) Taxes due States, Counties, Districts and Municipalities.	
	1.	(3) Wages	
	1.	(4) Other debts preferred by law	\$250.00
Schedule A	2.	Secured claims	\$21,156.68
Schedule A	3.	Unsecured claims	7,222.87
Schedule A	4.	Notes and bills which ought to be paid by other parties thereto.....	
Schedule A	5.	Accommodation paper	
Schedule A, Total.....			\$28,629.55
Schedule B	1.	Real Estate	\$10,800.00
Schedule B	2.	a Cash on hand	00.00
	2.	b Bills, promissory notes and securities	00.00
	2.	c Stock in trade.....	00.00
	2.	d Household goods, etc.....	225.00
	2.	e Books, prints and pictures.....	00.00
	2.	f Horses cows and other animals..	\$18,300.00
	2.	g Carriages and other vehicles...	400.00
	2.	h Farming stock and other imple-ments	220.00
	2.	i Shipping and shares in vessels..	00.00
	2.	k Machinery, tools, etc.....	500.00
	2.	l Patents copyrights and trade-marks	00.00
	2.	m Other personal property.....	00.00

Schedule B.	3.	a	Debts due on open accounts....	00.00
	3.	b	Stocks, negotiable bonds, etc...	00.00
	3.	c	Policies of insurance	00.00
	3.	d	Unliquidated claims	00.00
	3.	e	Deposits of money in banks and elsewhere.....	00.00
Schedule B.	4.		Property in reversion, remainder, trust, etc.....	00.00
Schedule B.	5.		Property claimed to be exempt...	2590.00
Schedule B.	6.		Books, deeds and papers.....	00.00
				<hr/>
Schedule B,	Total			\$33,035.00

EARL N. McKINNEY,
Petitioner.

[Endorsed on back]: Filed April 9, 1918. Mose Drachman,
Clerk. By Effie D. Botts, Deputy. [5]

In the United States District Court for the District of Arizona, at Tucson.

IN BANKRUPTCY—No. B-31—TUCSON.

In the Matter of EARL N. McKINNEY, Bankrupt.

Adjudication and Reference.

At Tucson, in said District, on the 9th day of April, 1918, before the Honorable William H. Sawtelle, Judge of the said Court in Bankruptcy, the petition of Earl N. McKinney, that he be adjudged bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Earl N. McKinney is hereby declared and adjudged bankrupt accordingly.

And it is further ordered that the said matter be referred to F. H. Bernard of Tucson, Pima County, Arizona, one of the referees in bankruptcy of this Court, to take all such further proceedings therein as are required by said Acts of Congress, and all such acts therein as the Court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that the said bankrupt shall attend before said referee on the 25th day of April, 1918, at ten o'clock A. M., and thenceforth shall submit to such orders as may be made by said referee or by the Court relating to his said bankruptcy.

WITNESS, the Honorable WILLIAM H. SAWTELLE, Judge of the said Court, and the seal thereof, at the City of Pima, in said District, on the 11th day of April, 1918.

[Seal]

MOSE DRACHMAN,

Clerk.

By Effie D. Botts,

Deputy Clerk.

[Endorsed on back:] Filed this 12th day of April, 1918, at 9 o'clock A. M. F. H. Bernard, Referee in Bankruptcy. [6]

In the District Court of the United States for the District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Notice to Trustee of His Appointment.

To J. P. Cull of Douglas, in the County of Cochise, and District Aforesaid.

I hereby notify you that you were duly appointed trustee of the estate of the above-named bankrupt at the first meeting of the creditors, on the 25th day of April, A. D. 1918, and I have approved such appointment. The penal sum of your bond as such Trustee has been fixed at \$500.00. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated at Tucson, Arizona, this 25th day of April,
A. D. 1918.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsed]: Filed Dec. 12, 1922. C. R. McFall, Clerk. United States District Court for the District of Arizona. [7]

Bond of Trustee and Order Approving Same.

KNOW ALL MEN BY THESE PRESENTS: That we, John P. Cull, of Douglas, Ariz., as principal, and J. T. Hood of Douglas, Ariz., and W. J. Reay of Douglas, Ariz., as sureties, are held and firmly bound unto the United States of America in the sum of Five Hundred (\$500.00) Dollars, in lawful money of the United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this 29th day of April, A. D., 1918.

The condition of this obligation is such, that whereas the above-named John P. Cull was, on the 25th day of April, 1918, appointed trustee in the case pending in bankruptcy in said court, wherein Earl N. McKinney is the bankrupt, and he, the said John P. Cull, has accepted said trust with all the duties and obligations pertaining thereunto.

Now, therefore, if the said John P. Cull, trustee

as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as said trustee, then this obligation to be void; otherwise, to remain in full force and virtue.

JOHN P. CULL. (Seal)

J. T. HOOD. (Seal)

W. J. REAY. (Seal)

Signed and sealed in the presence of

G. C. OSBURN, Douglas, Ariz.

B. M. ASHLEY, Douglas, Ariz. [8]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

ORDER.

At a court of bankruptcy held in and for the District of Arizona, at Tucson, Arizona, on the 30th day of April, 1918.

Before F. H. Bernard, Referee in Bankruptcy, in the District Court of the United States for the District of Arizona.

It appearing to the Court that John P. Cull, of Douglas, in said District, has been duly appointed trustee of the estate of the above-named bankrupt

and has given bond with sureties for the faithful performance of his official duties, in the amount fixed by order of the Court, to wit, in the sum of \$500.00—

IT IS ORDERED that the said bond be, and the same is, hereby approved.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsed on back:] Bond of Trustee and Order Approving Same. Filed April 30, 1918. Mose Drachman, Clerk. By Effie D. Botts, Deputy.
[9]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-32.

In the Matter of EARL N. McKINNEY, Bankrupt.

Trustee's First Report.

To F. H. Bernard, Esq., Referee in Bankruptcy:

I, John P. Cull, the Trustee in this proceeding, do hereby report as follows:

That, on the 26th day of April, 1918, I was appointed Trustee herein, immediately qualified by filing the required bond and have since acted as such.

That on entering upon my duties I investigated as to what was done with the property of the bankrupt, and after some considerable trouble and much time, the bankrupt having immediately left

the State and located as I am informed in the State of California, and having no sources of information but as I could search it out I have had much trouble in arriving at any definite conclusion on any proposition, as all the property was turned over to one William Cowan one of the principal creditors, or at least I found the said William Cowan in possession of about all the property left by said bankrupt, except as herein set out.

That the only property that is now available to this trustee and can be handles and sold for the benefit of the creditors is the following described real estate to wit:

(The following paragraph enclosed in parentheses, is marked on original report: "Not available. See latter part of Report."—Clerk's Note.)

The North one-half ($\frac{1}{2}$) of the Northwest quarter ($\frac{1}{4}$) also known as Lot No. One (1) and the Northeast quarter of the Northwest quarter all of Section No. Thirty-one in Township 33 South of Range 28 East of Gila & Salt River Base and Meridian, in the County of Cochise, State of Arizona, the tract containing about 80 acres.

Also a lease on *on* school lands from the State of Arizona to [10] Sec. 36 Tp. 22 South of Range 26 East of Gila & Salt River Base and meridian in said County of Cochise, State of Arizona.

(2) That the trustee has never been able to get this lease contract but hopes to get same in his possession sooner or later however as shown by the petition filed herein the bankrupt claims that all

improvements on this Section are in the possession of the said William Cowan under his said judgment.

That this part of the property should be ordered sold and disposed of as soon as it is possible; the lease I believe could be sold at private sale to better advantage than at public auction. These two properties should be appraised and ordered sold as no benefit can be had by holding longer.

That as soon as I receive a certified copy of the order approving my bond and adjudication I will file same in the office of the County Recorder of this county where this land is located.

That the bankrupt asks and claims that he is entitled to the following property as exemptions:

The South half of NW. $\frac{1}{4}$ and West $\frac{1}{4}$ of
the NE. $\frac{1}{4}$ all of Sec. 29 Tp. 23
South of Range 28 East of Gila and
Salt River Base and Meridian in
Cochise County, State of Arizona,
valued at \$1600.00

As a homestead:

Household goods situated on ranch near Douglas, Arizona, valued at	150.00
Five milch cows described in the petition and valued at	625.00
Two head of horses valued at	150.00
Set of harness valued at	25.00
One wagon valued at	40.00

Total \$2590.00

I find on investigation that at about the time of the filing and adjudication of the bankrupt's peti-

tion and at the time he turned over the property to said William Cowan the bankrupt left the State of Arizona and took up his residence in the State of California, and is now a nonresident of the the State of Arizona. [11]

This being a fact I do not believe that the bankrupt is entitled to the provisions of law granting him exemptions and that such provisions granting exemptions apply only to *bona fide* residents of the State of Arizona and that being true a citation should issue to him to show cause why this property should not be taken over by the trustees and administered on for the benefit of the creditors.

(3) Section 3288 of the 1913 Statutes defines those who are entitled to Homesteads exemptions, 'as Every person who is the head of a family and whose family reside within this State, * * *

Sec. 3302 provides as to personal exemptions and being a part of the same Chapter as to homesteads the provisions as to who may claim exemptions of personal effects must be the same as laid down in Sec. 3288.

I am advised that the bankrupt having taken up his residence in the State of California before his exemptions have been adjudicated will defeat his rights to exemptions.

As is known by you and has been reported herein all the rest of the property as scheduled by bankrupt was taken over by one William Cowan the largest creditor, and the excuse and cause of this taking is given as under a Judgement rendered in the Superior Court of Cochise County Arizona.

I have been unable to ascertain to a certainty the exact date of this change of possession from the Bankrupt to said Cowan but it must have been about the time of the proceedings here instituted, and I have had examined the Court Procéedings leading up to this taking and find that the Complaint filed sets up seven causes for action, and was filed on the 2d day of January, 1918.

The First Cause alleges on a promissory note of date Jan. 8th, 1915, for the sum of \$3,500.00 and interest Int. paid to Jan. 8th, 1916.

Note secured by Real Estate Mtg. N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ or Lot 1 and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ or Lot 2 and S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$. All in Sec. 31 Tp. 23 S. of Range 28.

Additional security on Chattels 16 head of horses, 1 mule and all cattle branded E. R. L. in Sulphur Springs Valley.

2d Cause for Action on Note of \$2,000.00 dated Jan. 5th, 1916—10% interest.

Secured by real estate Mtg. on SE. $\frac{1}{4}$ Sec. 4 E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 30, all in above Tp. and Range. [12]

3d. Cause of action on note of \$2500.00 dated May 22d. 1916, 10% interest Secured on Real Estate S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and *and* W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$, all in Sec. 29, Same Tp. and Range.

4th. Cause of action on note for \$1660.00 of date Oct. 22d, 1914, secured on chattels 35 cows, 26 calves. Filed Nov. 7th, 1917.

5th. Cause of action on note of \$4600.00 of date Jan. 15th, 1914. Secured by Chattel Mtg. on 200 head or more cattle (4) all the cattle he owns and increase branded E. R. L.

6th. Cause of action on note of \$2000.00 dated Feby. 18th, 1914, secured by chattel Mtg. on 30 cows, 2 Delivery wagons, 14 head of horses, 2 Feed Wagons, 2 Cream separators.

7th. Cause of action on chattel mtg. *no* note mtg. dated May 8th, 1917, and given for \$300.00 on Ford Automobile.

On the 4th day of Jan., 1918, Earl N. McKinney, bankrupt, made his personal appearance and filed his answer confessing that he executed the above notes and mortgages and offered to confess judgement for the sums of \$16,260.00 principal, \$3641.68 Interest and \$1974.59 Attys. Fee.

The answer was signed by Earl McKinney himself but from all appearances the same was prepared by David Benshemol, the plaintiff's attorney.

There appears a letter to the Judge from McKinney of date Jan. 4th, 1918, stating in substance that Mr. Benshemol had him sign a confession of judgement in favor of Wm. Cowan in the suit brought Jan. 2d. and states that he did not understand the nature of the judgement until I see Mr. Cowan and not enter the judgement until he could see Mr. Cowan.

The summons in this suit was issued but not served or handed to the sheriff for service.

On the 8th day of Jan., 1918, there was filed the following agreement for judgement:

“It is hereby stipulated and agreed by and between the plaintiff and defendant that judgement may be entered for the plaintiff for the sum of \$16,260.00 principal and \$3641.68 Int. Interest computed at the rate of 10% per annum to Jan. 3d, 1918, and an attorney fee payable to David Ben-shemol, Esq., for \$500.00 and costs and that execution may be issued hereon as prayed for in the complaint.

Signed—WILLIAM COWAN.
EARL McKINNEY.

The Court has made the following minute entry:

“Jan. 8th, 1918.

(Title.)

Upon consideration of the confession of judgement filed herein by the defendant, it is by the Court ordered that upon presentation by the plaintiff of a formal written judgement in the action and its approval and signing by the Court Judgement will be rendered in favor of plaintiff and against defendant. [13]

That no written judgement was ever presented to the Court for approval and signing nor has in said case there ever been entered any judgement.

(5) That the said William Cowan has taken over all the assets and property of the bankrupt except the property claimed as exempt, and the lease from the State of Arizona to McKinney of Sec. 36 described above.

I find since writing out the first part of this report that the 80 acres above described as being subject to administration by this Trustee is included in the

first mortgage and in the first cause of action of the Complaint and is now in the possession of *the* William Cowan, and cannot be used at this time.

That there has been filed in Court none of the original mortgages on notes for cancellation as required by law in said case of Cowan vs. McKinney.

That the acts of Cowan and McKinney shows a plain case of unlawful conversion of the property of the Bankrupt by said William Cowan and I am advised that an action against Cowan for the full value of this property is about the only way we can get results or an action for the difference between the amount of Cowan's Mtgs. and the Value of the property, and just which proceeding would get the best results is hard for me at this time to say, but it would seem to me that an action for the value of the property would be best as Cowan has at the time nor since any order of Court or judgement authorizing him to take over this property.

In that case all said property should be appraised by appraisers and as Mr. Packard one of the appraisers named *have* very close relations with Mr. Cowan I believe it would be for the best interests of the creditors that Pearl Adams be appointed in his place to make this appraisement.

I ask you to make the necessary orders on this report that will best preserve the interests of this estate, and especially take some action on the exemptions as I do not believe that the bankrupt is entitled to same and that such property should be turned over to me for administration, and order what action

seems best as to the conversion of the property by said William Cowan.

That some of the property should be sold so that I will be able to get funds to carry on the administration of this estate as I have not been able to [14] get any funds and what work has been done has been (6) done with the understanding that possibly some funds may be realized sooner or later.

I have no funds in hand so far.

Dated this 31st day of July, A. D. 1918.

JOHN P. CULL,
Trustee.

State of Arizona,
County of Cochise,
City of Douglas,—ss.

I, John P. Cull, the Trustee herein, do hereby make solemn oath that the statements and facts contained in the above report are true according to the best of my knowledge, information and belief.

JOHN P. CULL.

Subscribed and sworn to before me this 31st day of July, A. D. 1918.

[Seal]

H. D. PALMER,
Notary Public.

My commission expires June 1, 1921.

[Endorsed on back]: Filed this 3d day of August, 1918, at 9 o'clock A. M. F. H. Bernard, Referee in Bankruptcy. [15]

In the District Court of the United States, in
the District of Arizona.

BANKRUPTCY—No. B-31—TUCSON.

F. H. BERNARD, Referee.

In the Matter of the Estate of EARL McKINNEY,
Bankrupt.

Supplemental Report of Trustee John P. Cull.

Since filing Report on investigation I find that at about the time that William Cowan took over the property of said above *bakrupt* Novr. 2d, 1917, he did so not with the free will of the Bankrupt but forced Bankrupt to do so, and at the time and before this occurred he desired to go through bankruptcy but was advised by Cowan and Counsel Benshemol that he must not do so, and they Cowan and his counsel proceeded to not only get hold of all the property both real and personal, possessed by McKinney, that Cowan claimed a lien on by virtue of his mortgages but got and took over the business which was run for the benefit of Cowan from Novr. 2d, 1917, up to about the time McKinney filed his petition in Bankruptcy herein.

There has been no accounting for the money received while having possession of and running the business by Cowan from the 2d day of Novr. 1917 to April 1918.

That said Benshemol for Cowan took possession of the following property that was not covered by

mortgage and converted it to his own use, or the use of Cowan:

The Dairy Lunch, a restaurant sold to LePine Novr. 2d, 1917 by Cowan and Benshemol for the sum of \$619.52.

Several head of hogs disposed of by them for a sum unknown by us.

The leases and improvements on school section 36 Cochise County, State of Arizona, valued at \$1500.00 improvement.

Safety check apparatus valued at \$35.00. [16]

What has become of the property claimed as exempt we believe (2) that it will be found that Cowan has absorbed it.

I believe the only way to get at the facts in these transactions is for you to issue a citation to William Cowan and David Benshemol his attorney to appear before you for an examination in Douglas, Arizona at some date to be fixed by you, at which we may attend and examine under oath these parties as to the disposition of the Bankrupt's property.

We have reduced none of the property to possession so can see no value in any appraisement for the estate at this time.

JOHN P. CULL.

Subscribed and sworn to on information & belief before me this 2d day of October, 1918.

[Seal]

J. W. CALVERT,

Noatary Public.

My commission expires May 5th, 1920.

[Endorsed on back:] Filed this 4th day of October, 1918, at 9 o'clock A. M. F. H. Bernard, Referee in Bankruptcy. [17]

In the District Court of the United States for the
District of Arizona.

BANKRUPTCY — No. B-31—TUCSON.

In the Matter of EARL McKINNEY, Bankrupt.

Statement of Evidence of Bankrupt.

At a meeting in Bankruptcy held in the City of Douglas, County of Cochise, and District aforesaid, on this 21st day of October, 1918, before F. H. Bernard, Referee in Bankruptcy.

This being the return date upon the order issued heretofore by the Referee, requiring the bankrupt to appear and be examined and Earl N. McKinney, the bankrupt herein, being present, with his attorney, and the Trustee herein, John P. Cull, and his attorney C. V. Manatt, being also present, the bankrupt was duly sworn and testified in substance as follows:

Testimony of Earl Nichols McKinney, Bankrupt.

My name is Earl Nichols McKinney, and I now reside in the town of Gilbert, Arizona. I have lived near Douglas previously since February, 1905, where I was in the dairy business up to about the first day of November, 1917. On that latter date William Cowan took over all my property both real and personal stating at the time that he would run

the business until he got his money out of it, and that he would return the property when he got paid off. In this arrangement, Cowan claimed that I owed him in the neighborhood of \$19,000, which indebtedness was covered by a mortgage over all of my property, lots, cattle, and everything else.

As to whether or not any part of this amount has been paid I will state that a portion has been paid but I do not remember how much. I do not know for sure and therefore cannot say. Cowan told me he has credited all amounts paid [18] by me on the notes and also W. S. Dixon has done likewise. I do not know how many of my notes Dixon held or holds or how many are in Cowan's possession but there are no more than there should be. With regard to the foreclosure suit, filed in the Superior Court of Cochise County, in January, 1918, I was never served with any papers. David Benshimol, Cowan's attorney, gave me an acknowledgment of the debt and I signed it. It was a confession of judgment. I objected to a charge of \$1900.00 attorneys' fees in this suit and upon the amount being reduced to \$500.00 I signed the confession.

The following questions were then asked by Mr. Manatt on behalf of the Trustee:

"Now Mr. McKinney in the foreclosure suit filed against you in Cochise County the pleadings show the following causes of action:

The first cause of action, a note for \$3500.00 dated January 8th, 1915, covered by a real estate mortgage.

Mr. McKINNEY.—The start of all was the \$4600.00 mortgage.

Mr. MANATT.—On this \$3500.00 note there appears to be two endorsements of payments of interest. October 23d, 1915, \$87.50 interest paid to April 8th, 1915, and January 3d, 1916, \$262.50 interest paid to January 8th, 1916.

The second cause of action is on a note for \$2000.00 dated January 5th, 1916, no endorsements whatever.

The third cause of action is upon a note for \$2500.00, dated May 22d, 1916, no endorsements.

Mr. McKINNEY.—This money was paid by Cowan and he got a mortgage over my school section.

The fourth cause of action is on a note for \$1660.00, dated October 22d, 1914, secured by a chattel mortgage. Endorsement of interest payment dated January 22d, 1915, no amount given. [19]

The fifth cause of action, note for \$4600.00, dated January 21st, 1914, endorsement, interest paid November 3d, 1915. No amount given.

This note is secured by a mortgage over two hundred head of cattle.

Mr. McKINNEY.—This is the first mortgage I ever gave.

The sixth cause of action is on a note for \$2000.00, endorsements interest paid to September 18th, 1914. No amount given.

The seventh cause of action, note for \$300, dated

May 8th, 1917, secured by chattel mortgage on Ford automobile.

Mr. McKINNEY.—Cowan never paid me any money on this note. It was not supposed to be in any of my indebtedness.

Mr. MANATT.—The notes, as shown in the complaint, show a payment by you Mr. McKinney of \$350.00 and no amounts are given for the other interest payments.

Mr. McKINNEY.—I do not know what the notes show as I never saw them but I paid more than \$350.00.

Mr. MANATT.—Did Mr. Cowan take possession under his various mortgages?

Mr. McKINNEY.—Yes, Cowan took possession of everything.”

Further testifying the bankrupt stated as follows:

Cowan and Benshimol brought Jim Lowans out to my ranch, and they spent about a week counting cattle, and Cowan said he would have to have his money then for some reason.

I turned in all money from the business to Benshimol and he was to pay all bills. No account was ever rendered to me but I understood the ranch account was carried in the name of William Cowan, mortgagee, by David Benshimol, attorney, [20] and the moneys collected deposited in the First National Bank of Douglas, Arizona. The average monthly receipts of the business at the time I turned it over to Cowan was from twelve to fifteen hundred dollars a month. The expenses ran about the same.

When I turned over all my property to Cowan

in November, 1917, the cattle were not counted, but at that time I had between two hundred and two hundred and fifty head of cattle. About one hundred milk cows, and about one hundred and fifty range cattle.

I never gave a bill of sale for anything. Cowan said the property was all his and I supposed it was. He had a mortgage over everything. He offered to cancel everything but never did. I never gave him a bill of sale or deed for the property.

As to the Dairy Lunch, Cowan had a mortgage on the fixtures at the time the \$300.00 mortgage on the automobile was given. The mortgage on the fixtures was never recorded as far as I know.

About three years ago I moved about one hundred and fifty head of cattle to Phoenix and shipped back to Douglas eighty-four head, and Cowan got the money for the balance. This was in October, November and December, three years ago. I sent him three checks, one for eleven or twelve hundred dollars, two for five hundred each, amounting in all to approximately \$2200.00, and Cowan said he gave me credit for these amounts on my notes. These amounts paid by me should have been endorsed on some of the notes.

When Cowan took over my property he said that when he was paid out in full he would turn it back to me. Mr. Benshimol was to be the cashier and draw \$25.00 a month from the business. This was a verbal arrangement. I left the ranch on April 2d, 1918, and between November, 1917, and April, 1918, I

worked at the ranch under the arrangement with Cowan. [21]

I do not know whether the payment of \$350.00 endorsed on the notes is taken out of the \$2200.00 I sent Cowan but I believe I paid more than \$2200.00. Cowan sold the Dairy Lunch to Lapine for \$500.00, at least that is the consideration I understood. I do not know that Lapine paid \$619.00 for the Dairy Lunch. Benshimol wanted it sold and both he and Cowan told me it was sold for \$500.00.

As to the property on Twentieth Street, I was buying that on contract with Dixon. I was to pay \$10.00 a month and I made two payments and with Cowan's permission moved a house from the ranch on to this property at an expense of about \$150.00. Cowan paid the balance on the contract with Dixon amounting to \$250.00 and I believe he got a deed for the property.

As to my financial affairs, I will state that I wanted to go into bankruptcy before I turned over my property to Cowan but neither Cowan or Benshimol would consent to it and Cowan left it to Benshimol to take care of my creditors. They began to get rid of me the last of March, 1918, when Kirkland was sent out to the ranch.

I estimate the value of my property at the time it was turned over to Cowan to between thirty and thirty-five thousand dollars. Cowan did not think it was worth \$19,000.00 but I never agreed with him. The value of the 20th Street property was as follows: The lot \$275.00, and house and improvements \$150.00.

As to the chattel mortgage on the cattle, with Cowan's consent there were a number of changes made and I bought and sold many cattle. I cannot say now how many of the cattle included in the original mortgage are now on the property or were at the time I turned over everything to Cowan. There were quite a few changes but I think there are still a few old cows left. [22] I cannot, however, make any estimate as new stuff was bought continually, cattle sold and the money turned over to Cowan.

With regard to the business I will state that there were numerous improvements on the land comprising the home ranch, plant and separator together worth about \$15,00.00, corrals, barns, tanks, etc. I never had any accounting with Cowan. I paid more to Cowan than the \$350.00 and interest payments noted on the several notes. I do not think Cowan would take advantage of me but believe Benshimol would. I stayed on the ranch from the first of November, 1917, to the first of April, 1918, and was paid under the following arrangement with Cowan and Benshimol. I owed a number of bills in Douglas and I let these creditors have milk and the amount of milk supplied such creditors was credited against my account. Benshimol knew of this agreement and the amount so credited.

I do not know why the foreclosure suit was brought in January, 1918, after I had turned over the property to Cowan in November, 1917. Benshimol however, said that the suit could be started

and left pending until such time as the creditors were paid in full. Benshimol told me he would see me through and after four months he was ready to throw me out. Later in the year 1918, Benshimol wrote me that he had not heard a "yip" out of the creditors.

There are three head of the fourteen head of horses owned by me and all of the hogs are gone. Benshimol told me several times that the creditors could not do anything.

Since I left Arizona in April, 1918, I have been working in the Government Shipyards at San Pedro, California. I am living there with my sister.

I wanted to take bankruptcy proceedings in November, 1917, as I have testified, but both Cowan and Benshimol insisted that I should not go into bankruptcy. Benshimol said I must [23] wait until after the four months had expired. I do not know why but I understand Cowan would then get everything. Cowan never asked me for a bill of sale or deed. I thought he had a right to take everything under his mortgages. Cowan knew I had other creditors, and talked about them on numerous occasions. He said he did not care what became of my other creditors. Benshimol during all this time was Cowan's attorney, he was not mine. He claimed to be working for Cowan.

As to the claim of the National Engraving Company, I had nothing to do with it. Benshimol himself ordered the cuts, handled the matter entirely and he should pay it. It is not a claim against me.

The other claims filed are as far as I recollect, correct.

The lease on the school section was turned over to H. A. Wicker in Benshimol's office. Wicker was then working for Cowan. The improvements on the school section were mortgaged to Cowan and this mortgage was made out the same time that the loan for \$2500.00 was made. The lease was assigned to Wicker. The improvements on this school section consist of a four wire fence, windmill and dirt tank and are worth about \$1000.00.

Frank Ramsey's wife transferred this lease to me. Fen S. Hildreth of Phoenix acted in this matter of the transfer and has a bill against me for \$28.20 but Cowan and Benshimol would not let me pay it.

The Hersley place is also mortgaged to Cowan; in fact everything I own was mortgaed to Cowan. I never made a schedule of the property when I turned it over to him.

The 20th Street property cost me about \$150.00 in improvements and I also paid \$20.00 on the contract to purchase.

The \$300.00 mortgage on the automobile was given to Cowan to protect this machine which I used in the business. [24] No money passed. As far as I know the foreclosure suit was filed to keep the other creditors out until Cowan was paid in full.

As to this suit, Benshimol himself prepared my answer. I afterwards wrote the Judge at Tombstone regarding the judgment and asked that no judgment be entered. Later the confession of

judgment was filed but no final judgment has been rendered as far as I know. There was no consideration for my turning over everything to Cowan. He only said he would make the business pay out his indebtedness and return it to me. Benshimol said, "To —— with the general creditors," and a lot more. They tried to freeze me out and lied to me from the jump. I never thought Cowan would double cross me like he did.

The notes are probably in Benshimol's office, and all returns and receipts from the business were delivered to Benshimol.

I never tried to remove the exempted property from the ranch. I did not know I was entitled to it until everything was settled up.

The Dairy Lunch, the 20th Street property, and the improvements were not in the schedules. They were sold before filing my petition in Bankruptcy. I was my understanding that the agreed price for the Dairy Lunch was \$500.00 and I do not know that Lapine actually paid therefore the sum of \$619.00.

EARL NICHOLS McKINNEY. [25]

I hereby certify that the above and foregoing is a true and correct statement of my testimony before the Referee in charge of the matter of Earl N. McKinney, Bankrupt, No. B-31, Tucson, at a hearing in said matter held in Douglas, Arizona, on the 21st day of October, 1918.

Dated this 27th day of October, 1918.

EARL NICHOLS McKINNEY.

[Endorsed on back:] Statement of Evidence of Bankrupt Taken October 21st, 1918. Filed this 30 day of Oct., 1918, at 2 o'clock P. M. F. H. Bernard, Referee in Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [26]

In the United States District Court, in the District of Arizona.

No. B-31—TUCSON.

In the Matter of the Estate of EARL McKINNEY,
Bankrupt.

Special Report of Trustee.

F. H. BERNARD, Referee.

The undersigned Trustee in the above matter desires to report:

That from the assessment made on the creditors the trustee has been able to collect the total sum of\$92.40.

From which should be deducted.

Bill of Referee as rendered \$24.52.

Bill of Trustee as rendered \$29.14.

Total \$53.66.

Which leaves a balance available of \$38.74
now in hands of trustee.

That the Trustee has in his investigations of the affairs of said estate to determine the liability of William Cowan for which these funds have been raised has expended the following:

1918.

July 15th.	To 10 Gal. Gasoline trip to Tomb-	
	stone to examine records.....	\$3.50
	Four meals at Tombstone...	2.50
Oct. 1st,	24 Gals. Gasoline Trip to Tucson to	
	consult Referee with attorney	7.68
	Hotel Bill while in Tucson...	5.00
	8 Meals while in Tucson.....	6.40
Oct. 4th.	To U. S. Marshall serving Sub-	
	poenas.	4.06
Total.		\$29.14

That the Trustee did not take vouchers for the above expenditures but that he did expend the same and that the said sums are true and correct and actually expended by the trustee for and on behalf of the above estate.

That the results of my and my attorneys, investigation of the affairs between said William Cowan and the bankrupt is that at or about the 1st day of November, 1917, said Cowan, went into possession of all the property belonging to said bankrupt's estate as scheduled in the petition in bankruptcy, and took over some other property not scheduled in said petition and that the value of the property [27] so taken over by Cowan is valued at from \$35,000.00 to \$45,000.00.

That the claim of Cowan as he claims is about \$20,000.00 but the bankrupt in his examination claims that a payment or three payments were made to Cowan some time ago aggregating something

over \$2200.00 which do not appear from the records to have been credited up.

We find further that when Cowan took over this real estate and personal property as mortgagee or otherwise that no deeds of conveyance or bills of sale passed to him from the bankrupt and the bankrupt claims that Cowan was to first run the business until he was made good or paid and then he was to turn back the property to the bankrupt.

That Cowan started foreclosure of his mortgages in the Superior Court of Cochise County, State of Arizona, in a case entitled William Cowan vs. Earl N. McKinney, which has never been prosecuted to final judgement for order of sale of the mortgaged property.

That said Cowan has assumed ownership of all this property and is in possession of the same, using and asserting ownership without legal right or process.

That it looks to the Trustee that much of the property taken over by Cowan is not covered by any existent mortgage, as much of the personal property had been sold and changed by mortgagor after the execution of the mortgages as testified by bankrupt, and from all that the trustee can gather that Cowan is in possession of all this property without authority of law, and has converted the same to his own use unlawfully, and that a considerable sum ought to be recovered from Cowan on an accounting, for the benefit of the general unsecured creditors, and the trustee recommends that an action be instuted against said Cowan for an

accounting in the Superior Court of Cochise County, Arizona.

That in the trustee's opinion there will be sufficient funds coming from the unsecured creditors to prosecute this action.

(3) The Trustee asks that his account be allowed and ordered paid as set out herein and that the Referee authorize him to proceed with proper [28] action against William Cowan for an accounting and for such other order as is necessary to collect the assets of said bankrupt estate.

JOHN P. CULL,
Trustee.

Subscribed and sworn to before me this 22d day of November A. D. 1918.

[Seal]

H. D. PALMER,
Notary Public.

My commission expires June 1st, 1921.

The foregoing report and petition of the Trustee herein having been presented and duly considered by me, IT IS ORDERED that the account therein presented be approved and allowed and the items therein shown ordered paid, AND IT IS FURTHER ORDERED that the Trustee be, and he is hereby, authorized and directed to institute suit for accounting against William Cowan of Cochise County, Arizona.

Dated at Tucson, Arizona, this 25th day of November, 1918.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsed on back:] Filed this 25th day of November, 1918, at 10 o'clock A. M. F. H. Bernard, Referee in Bankruptcy. [29]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Order for Trustee to Bring Suit.

The trustee herein, John P. Cull, having on the 25th day of November, 1918, filed a special report showing among other things that as the result of a meeting of creditors of the above bankrupt held in the City of Douglas, Arizona, on the 21st day of October, 1918, he, as such trustee, had collected from a number of such creditors a fund for the prosecution of a suit for accounting against one William Cowan, a resident of Cochise County, Arizona.

And it further appears from such report that the trustee and his attorney are of the opinion that in order to properly protect the interests of the general creditors and of the bankrupt and further to properly collect the assets of this estate it is now necessary for the said trustee to commence an action against the said Cowan for an accounting in order that the said Cowan may be required to properly account for property of the bankrupt now held by said Cowan;

Now, on motion of C. V. Manatt, Esq., attorney for the trustee,—

IT IS ORDERED that John P. Cull, as trustee of the above-named bankrupt, be, and he is hereby authorized and directed to institute suit in the proper court against William Cowan of Cochise County, Arizona, for an accounting and to take such proceedings as may be necessary in the premises.

Dated at Tucson, Arizona, this 25th day of November, 1918.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsed on back:] Filed this 25th day of November, 1918, at 11:50 o'clock A. M. F. H. Bernard, Referee in Bankruptcy. [30]

In the United States District Court, in and for the
District of Arizona.

No. B-#31—TUCSON.

F. H. BERNARD, Referee.

In the Matter of the Estate of EARL N. McKINNEY, Bankrupt.

Report of Trustee John P. Cull, Douglas, Arizona.
To F. H. Bernard, Referee in Bankruptcy:

The undersigned trustee in the above matter desires to report in the above matter:

That since the last special report on the suggestion and authority of the referee this trustee did

start suit in the Superior Court of Cochise County, State of Arizona, as follows: J. P. Cull, Trustee, vs. William Cowan, Case No. —, for an accounting.

That after said case was started in the above court it was learned that Cowan was proceeding to sell all the property *the property* of the bankrupt under a judgement obtained by him on or about the 8th day of January, 1918, in a case wherein said William Cowan was plaintiff and the bankrupt Earl McKinney was defendant, in which case as heretofore reported, the defendant Earl McKinney was induced by Cowan and his Attorney David Benshemol to sign a confession of judgement, and finally after the above cause on our part was started and filed and summons issued and served on Cowan, Cowan and his attorneys, without notice to us, procured a judgement entry as prayed for and confessed by defendant in the case so started by him, and under this judgement, had proceeded to advertise and sell at sheriff's sale the property involved, all of which has been reported to you, and under your suggestion I started another cause entitled John P. Cull, Trustee, vs. William Cowan and the Sheriff of Cochise County, State of Arizona, asking for a restraining order and a temporary order was granted by Judge Shute then (2) sitting in Tucson restraining Cowan and sheriff from selling the property involved, at the time our Judge Alfred C. Lockwood being absent from the county of Cochise and State of Arizona. [31]

That as soon as John Lockwood returned from

his trip he promptly dissolved the temporary order so issued by Judge Shute and fixed the supersedeas bond in the penal sum of \$46,000.00, which I could have given but I thought it unwise to obligate myself in any such sum.

That at various times unknown to me or my attorneys it is presumed on the request and motion of the attorneys for the defendant Cowan demurrers to the complaints filed by me were sustained in both cases, and it appearing to me as well as my attorneys, that no progress was being made and none could be made in said cases both cases so started by me were dismissed without *predjudice* in said court, so that now there are no legal actions or other process pending in said matters against said Cowan.

It at this time appears to me that little if any use can be served the estate by bringing actions against Cowan in the Superior Court of Cochise County, State of Arizona.

I find from investigation, and information given me by the bankrupt Earl McKinney, that the following is about, the status of the affairs that existed between Cowan and McKinney:

That Cowan claimed in the action brought and before at about the 1st day of November, 1917, that McKinney owed him on promissory notes as follows:

(1) Note dated Jany. 8th, 1915, for	\$ 3500.00
Int. paid to Jan. 8th, 1916.	
(2) Note dated Jan. 5th, 1916	2000.00
No interest paid.	
(3) Note dated May 22d, 1916	2500.00
No interest paid.	
(4) Note dated Oct. 22, 1914	1660.00
Int. paid to Jan. 22d, 1915.	
(5) Note dated Jan. 15th, 1914	4600.00
Int. paid to Nov. 3d, 1915.	
(6) Note dated Feby. 18th, 1914	2000.00
Int. paid to Sept. 18th, 1914	

Total \$16260.00

That the interest claimed to have been paid on the above notes I am informed by the bankrupt was paid by him to Dixon & Co. in small payments by the month or at various times as he could spare the money, and those are all the indorsements that have been made on the notes that can be found, and that such interest payments so made and credited would not exceed something over \$1300.00, the true and exact amounts cannot now be learned. [32]

That an examination of the records in said suit of Cowans vs. McKinney shown by the claim of plaintiff and by confession of the defendant that there was due on said notes as set out in said action the following amounts:

On principal as evidenced by said notes	\$16260.00
Interest as allowed and computed in case	3641.68
Attys. fees allowed and agreed upon	500.00

Total \$19401.68

That under said judgement so obtained by collusion and misunderstanding by and between Cowan and McKinney in this respect that McKinney at no time in the transaction knew what his legal rights were as a mortgagor, and was led to believe by Cowan and his attorney that Cowan as mortgagee could at any time and at his option take over all the property claimed under the mortgages and thereby induced McKinney to turn over the bankrupt's property to Cowan on the 1st day of November, 1917, with the agreement that McKinney was to run the business and as soon as Cowan received sufficient from the business to liquidate his claims then the property was to be turned back to McKinney, and during the time McKinney was running the business, he was to receive a salary, and under which arrangement McKinney did give his time and work aided by his experience, to the business from Novr. 1st, 1917, to April 1st, 1918, five months, and during said time all the proceeds were turned to Cowan, and McKinney received little or nothing for his work, and in the meantime this suit was started against McKinney and the latter without legal advice, and in collusion with Cowan and his attorney induced McKinney to make the confession and agreements (page 4) for the judgement as was finally entered in the said case of Cowan vs. McKinney, and therefore I allege and charge that such judgement was fraudulent as to the general creditors.

That at the time said judgement was rendered and obtained by Cowan this trustee is informed and

believe from the information obtained by and through the bankrupt, that the following amounts were received by Cowan, and never credited on the indebtedness claimed to be due Cowan from McKinney and which McKinney is not certain of the exact amounts but are approximately:

- (1) In Jan. or Feby. 1915, from sale of cattle near Phoenix by Wm. Stephens and Frank Ramsey two checks sent Cowan aggregating about \$ 1660.00

[33]

- (2) In Jan. or Feby. 1915, cattle sold to Percy Ritterstone, Phoenix 800.00
- (3) In 1918 the Dairy Lunch Restaurant sold to Chas. La Pine, Douglas .. 619.00
- (4) Equity in dwelling and lot in City of Douglas, Arizona 500.00
- (5) To lease of Section of State Lands and improvements thereon assigned to Cowan 1500.00
- (6) To interest charged on the items for which credit should have been given at least 738.00
- (7) To salary of Bankrupt for five months from Novr. 1st, 1917, to Apr. 1st, 1918 1000.00
- (8) For the use and benefit of the Real Property and personal property from Novr. 1st, 1917, to present time property estimated to be of the value of at least \$25,000.00 ... 5000.00

Total \$11817.00

These amounts I am informed Cowan has had and at no time or place have I found where McKinney has been credited with any of the amounts herein set out and charged, and as Cowan has had the amounts and use of and possession of all this property, which he bid in at sheriff's sale on the 25th and 28th of November, 1919, on execution issued in said fraudulent action and judgement obtained as herein alleged for the sum of \$24,349.34. I feel that he should account for a fair rental on this property so taken over by fraud and false representations to the bankrupt McKinney, as the McKinney estate was entitled to the possession and use of this property during all this time and pending foreclosure (5) proceedings without question as to the validity of the judgement obtained by Cowan vs. McKinney, as under the law I am informed the mortgagor has the right of possession of mortgaged property until the same has been judicially sold, and time for redemption has expired, and title legally passes to the purchaser, but without regard to such right of McKinney or his estate Cowan has and did take over the whole of this property, and used the same and had any and all benefits of same during all this time from the 1st day of November, 1917, and should pay a reasonable rental therefor which I charge \$5000.00 as fair and reasonable, and which is due the estate of the bankrupt. [34]

The bankrupt claims and states that the actual value of this property so taken over by Cowan was of much greater value and of the fair value of

over \$45,000.00 but so far as the contract had between Cowan and McKinney when Cowan took over the property I do not believe that we have much right to enforce as the same was a parol and not enforceable as I am led to understand.

But these items totaling \$11,817.00 of which I was informed Cowan has received and had the benefit of and has at no time given the bankrupt the benefit of or credited him with on any of the notes of indebtedness or the so called judgement obtained, I claim is the property of the bankrupt's estate, and is due that estate, and should be paid in by Cowan for the benefit of the general creditors, and the bankrupt.

Wherefore I ask and pray that such order be made to said William Cowan citing him to show cause why he should not pay to the estate of Earl McKinney the said items set out herein and aggregating the said sum of \$11,817.00, and that upon any *showin* of said Cowan that an order be entered herein and judgement be made that said Cowan pay to me as trustee of said estate the said sum of \$11,817.00 and the costs of any and all proceeding had hereon, and for such other and further order of the above Court as is just and proper in the premises.

That any hearing demanded or asked for by said Cowan on the (6) matters herein alleged and set out that an order be made requiring said Cowan to make a sufficient and proper deposit for the expense of any and all hearing hereon.

JOHN P. CULL,
Trustee.

State of Arizona,
County of Cochise,—ss.

John P. Cull, of lawful age, being first duly sworn on his oath deposes and says that he is the trustee duly appointed and acting in the matter of the estate of Earl McKinney, bankrupt, and that he has read over the above report and states that the statements therein contained were obtained by investigation and information given me and I believe them to be true, and they are true as to my best knowledge and belief.

JOHN P. CULL. [35]

Subscribed and sworn to before me this 4th day of December, 1919.

[Seal]

W. E. ABRAHAM,
Notary Public.

My commission expires Dec. 6th, 1921.

[Endorsed on back:] Filed this 5th day of Dec. 1919, at 2:30 o'clock P. M. F. H. Bernard, Referee in Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [36]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bank-
rupt.

**Order Citing Wm. Cowan to Appear Before
Trustee.**

At Tucson, on the 15th day of December, 1919.

Upon the application of John P. Cull, trustee of
said Bankrupt, IT IS ORDERED that William
Cowan, of Cochise County, Arizona, attend before
F. H. Bernard, one of the referees in bankruptcy
of this Court, at the law offices of Manatt & Stephen-
son, First National Bank Building, Douglas,
Arizona, on the 22d day of December, 1919, at 9:30
o'clock in the forenoon, to submit to examination
in relation to said bankruptcy, and that a summons
be issued and served upon each forthwith.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsed on back:] Filed this 15 day of Dec.
1919, at 2 o'clock P. M. F. H. Bernard, Referee in
Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By
Lella Spence, Deputy. [37]

In the District Court of the United States for the
District of Arizona.

No. B—31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bank-
rupt.

Referee's Findings of Fact and Conclusions.

On December 22, 1919, William Cowan, of Cochise County, Arizona, appeared before the Referee in response to a summons theretofore issued and was examined regarding his several transactions with this Bankrupt, and a brief *résumé* of the transactions is as follows:

During the years 1914, 1915 and 1916 William Cowan loaned various sums of money to the bankrupt and at the time the several loans were made, mortgages were given, over certain of the bankrupt's property. The bankrupt paid the interest on several of the loans from time to time, but in the fall of 1917, he became involved, and after several conferences with Mr. Cowan and David Benshimol, Esq., attorney for William Cowan, an agreement seems to have been reached whereby Cowan was to take over all of the bankrupt's property and manage the same with a view of working out bankrupt's indebtedness. Cowan was also to pay the bankrupt one hundred and fifty dollars a month out of the milk business theretofore operated and owned by the bankrupt.

The property belonging to the bankrupt and covered by Cowan's several mortgages was turned

over to Cowan, and Benshimol acted as agent for Cowan in managing the business. On December 12, 1917, the bankrupt addressed a letter to William Cowan whereby he delivered possession of all stock and personal property held under the several mortgage listed in such letter and stated that he, the bankrupt, was unable to pay either principal or interest on the notes given Cowan. In this letter the bankrupt also stated that if Cowan would clear up an attachment on a certain Ford automobile owned by the bankrupt, the latter would release all claim to such automobile. This letter is signed by Earl McKinney and is duly acknowledged before David Benshimol, a notary public.

On January 2, 1918, Cowan, through his attorney David Benshimol, brought proceedings in the Superior Court of Cochise County, Arizona, to foreclose the several mortgages which he held on the bankrupt's property; and after some discussion, as to the amount due by the bankrupt to Cowan, [38] a stipulation was entered into between Cowan and the bankrupt whereby the bankrupt agreed to confess judgment for sixteen thousand two hundred and sixty dollars (\$16,260.00). and interest on said sum to the 3d day of January, 1918, at the rate of ten per cent per annum, such interest amounting to three thousand six hundred and forty-one dollars and sixty-eight cents (\$3,641.68) and also for the sum of five hundred dollars (\$500.00) attorney's fees and ten dollars (\$10.00) costs, making a total of twenty thousand four hundred and eleven dollars and sixty-eight cents (\$20,411.68),

which amount was to bear interest at the rate of ten per cent per annum from the 3d day of January, 1918. Accordingly, the bankrupt and Cowan on the 8th day of January, 1918, filed the following agreement:

“IT IS HEREBY STIPULATED AND AGREED by and between the Plaintiff and the defendant that judgment may be entered for the plaintiff for the sum of sixteen thousand two hundred and sixty dollars (\$16,260.00) principal and three thousand six hundred and forty-one dollars and sixty-eight cents (\$3,641.68) interest; interest computed at the rate of ten per cent per annum to January 3d, 1918, and an attorney's fee payable to David Benshimol, Esq., for five hundred dollars (\$500.00) and costs, and that execution may be issued herein as prayed for in the complaint. Signed: William Cowan and Earl McKinney.”

The records of the Superior Court of Cochise County show that on January 8, 1918, the following entry was made “Upon Consideration of the confession of Judgment filed herein by the defendant, It is by the Court ordered that upon presentation by the plaintiff of a formal *written* in the action and its approval and signing by the court Judgment will be rendered in favor of plaintiff and against defendant.”

No further proceedings apparently were taken to sell the property in accordance with the stipulation and this entry until about a year later, when the record shows a formal written judgment dated the 16th day of December, 1918, and signed by

Alfred C. Lockwood, Judge of the Superior Court of Cochise County. Pursuant to this formal judgment, Cowan some time thereafter proceeded to advertise the property for sale and the Trustee herein obtained a temporary injunction staying the sale, and this injunction was subsequently dissolved and on November 25, 1919, the personal property was sold to Cowan by the sheriff of Cochise County for fifteen thousand seven hundred and thirty-six dollars and fifty-five cents (\$15,736.55) and the real property sold on November 28, 1919, for eight [39] thousand six hundred and twelve dollars and seventy-nine cents (\$8,612.79).

One of the transactions between Cowan and the bankrupt concerns the sale of what was known as the Dairy Lunch in Douglas, and this business was sold by Cowan for the sum of six hundred and nineteen dollars and thirty-five cents (\$619.35) and an item of ninety-seven dollars and fifty-five cents (\$97.55) paid by Cowan for the account of the bankrupt and the balance of five hundred and twenty-one dollars and eighty cents (\$521.80) applied on one of the bankrupt's notes to Cowan for forty-six hundred dollars (\$4600.00). Cowan also paid in the neighborhood of one hundred and one dollars (\$101.00) for the release of the attachment on the Ford automobile and also received an assignment of the bankrupt's contract in what was known as the 20th Street property.

That between the months of May and September, 1916, the bankrupt sold a number of cattle off of

the ranch and the proceeds thereof were turned in to Cowan, who credited a portion of the proceeds of each sale upon several notes of the bankrupt and also credited an account for insurance on the bankrupt's property amounting to two hundred and twenty-two dollars and fifty cents (\$222.50). The total proceeds of such sale amounted to two thousand four hundred and twenty-four dollars and fifty-cents (\$2,424.50) and the total credits upon the notes and on account of the insurance amounts to one thousand and seventy-seven dollars and fifty cents (\$1077.50), leaving a balance of one thousand two hundred and sixty-five dollars and fifty-four cents (\$1265.54) to be credited by Cowan upon McKinney's indebtedness to him.

Credit has been given to the bankrupt by Cowan upon the several notes set out in the complaint for various amounts of interest paid by the bankrupt and in the computation of interest is also included the sum of eight hundred and eighty-five dollars and seventy-one cents (\$885.71) covering taxes paid by Cowan on the bankrupt's property for the years 1914, 1915, 1916 and 1917.

It appears that after the bankrupt turned over his property to Cowan in November, 1917, he was employed in the Dairy business by Cowan and paid a salary of one hundred and fifty dollars (\$150.00) a month, and it also appears that Cowan has accounted to the bankrupt for this salary up until the time that the bankrupt left Douglas in April, 1918.

No showing has been made by Cowan of any credit or other dispositions [40] in favor of the bankrupt of the *balance* of money remaining in Cowan's hands from the sale of the cattle and it is further shown that interest upon the total indebtedness as agreed upon under the stipulation of January 8, 1918, has been charged at the rate of ten per cent until the sale of the property in November, 1919, and there is no showing of any reason or cause for the delay on the part of Cowan and his attorney to sell the property by proper proceedings as soon as the entry for Judgment was entered by the Court on January 8, 1918.

The Trustee in bankruptcy has in his report filed in this matter on December 5, 1919, set out certain amounts which he claims should be credited to the bankrupt upon the several notes given to Cowan, but after a full consideration of the statements made by Cowan and of the records in the foreclosure suit before the Superior Court of Cochise County and also of other records submitted, there seems but little basis for such claims except in so far as the credits for moneys received from the sale of cattle and for the interest charged after possession was delivered by the bankrupt to Cowan are concerned.

One of the causes of action set out in the complaint embraced a note for the sum of three hundred dollars (\$300.00) which was secured by a chattel mortgage over the Ford automobile hereinbefore mentioned and the statement of the bankrupt with respect to this mortgage is to the effect that the

mortgage was given to protect the machine which was used by the bankrupt in his business and that he received no consideration for the mortgage. The statement of Mr. Cowan and other evidence submitted show that the automobile in question was attached and that the bankrupt released all claim to the machine upon the consideration of Mr. Cowan paying the attaching creditors claim against the machine, which amounted to about one hundred and one dollars (\$101.00) and which amount Mr. Cowan states he paid out of his own funds. The mortgage for three hundred dollars (\$300.00) was as far as the record shows given without any consideration whatever, and having released all claim in the machine to Cowan, the bankrupt should therefore have been credited with the sum of three hundred dollars (\$300.00) and interest upon Cowan's claim under the mortgage of this automobile. [41]

CONCLUSIONS.

After careful consideration of all evidence and statements submitted, the referee finds as follows:

1. That Cowan has not accounted to the bankrupt for the balance of the moneys received from the sale of the cattle or, to wit, for the sum of twelve hundred and sixty-five dollars and fifty-four cents (\$1265.54), which sum should have been credited upon the notes due by the bankrupt.

2. That the bankrupt has never received credit by Cowan for the amount of the chattel mortgage covering the Ford automobile and his account should therefore be credited to the estate of the sum of three hundred dollars (\$300.00) plus whatever in-

terest charge was made and in accordance with the judgment rendered in the Superior Court of Cochise County.

3. That as to the interest charged upon the indebtedness to Cowan from the 3d day of January, 1918, until the date of sale of the property, the bankrupt should be credited with interest at the rate of ten per cent upon the value of the personal property at the time it was turned over to Cowan, to wit, on the 12th day of December, 1917. The value of this property at such time and immediately prior thereto is estimated variously at between nineteen and thirty thousand dollars, but for the purpose of the present computations, the value of the property is taken at fifteen thousand seven hundred and thirty-six dollars and fifty-five cents (\$15,736.55), being the actual price paid by Cowan for the property at the time of sale in November, 1919. A computation of the interest upon the judgment from January 3d, 1918, to the date of sale of the personal property on November 25, 1919, shows that approximately three thousand four hundred and thirty-nine dollars and ninety-seven cents (\$3,439.97) of the total interest charge is made up of interest on the moneys claimed to be due upon the mortgages covering the personal property and this sum of \$3,439.97 should therefore be credited to the bankrupt's account as no interest should have been allowed or demanded after the bankrupt had delivered the property to Cowan and the bankrupt should also not be held responsibly for Cowan's

delays in proceeding under the stipulation and judgment in the foreclosure proceedings. [42]

The bankrupt should therefore be allowed credit for the sum of three thousand four hundred and thirty-nine dollars and ninety-seven cents (\$3,439.97) on account of interest charged as above set out, a further credit of the sum of twelve hundred and sixty-five dollars and fifty-four cents (\$1265.54) on account of balance due him under the sale of cattle and the further sum of three hundred dollars (\$300.00) with interest thereon from January 3, 1918, to November 25, 1919, on account of principal and interest charged under the mortgage covering the Ford automobile.

4. With regard to the interest charge made by Cowan upon the several mortgages covering the personal property and as allowed under the judgment of the Superior Court, reference is made to Brandenburg on Bankruptcy, 1917 edition, page 687, wherein the following language is used: "The taking possession of *mortgage* property by the *mortgage* and omission to sell within a reasonable time operates as a satisfaction of the debt to the extent of the value of the property when the mortgagee took possession." Reference is also made to the case *In re Haake*, Federal Case No. 5883, in which it was held that where personal property had been taken by a mortgagee, even though he had expended money on it for repairs and lost money by its use so that its value became less by reason of such use, the mortgagee must, nevertheless, credit the indebtedness of the mortgagor with the value of the

property at the time of its taking over by the mortgagee.

From the above findings and conclusions, it appears that the bankrupt is entitled to certain credits which have not been allowed him and which should in good conscience have been allowed him before he was induced to enter into the stipulations filed in the Superior Court of Cochise County, on January 8, 1918, and which stipulation is the basis for the judgment rendered against him. Whatever may have been the motives of the bankrupt or Mr. Cowan or his attorney in bringing about the foreclosure proceedings, after they had procured from the bankrupt on December 12, 1917, an absolute delivery to Mr. Cowan of all property covered by the several mortgages, the creditors of the bankrupt are entitled to the fullest protection and to a full investigation of the transactions and business dealings between Mr. Cowan and the bankrupt, especially in view of the bankrupt's statements, after he was declared bankrupt and also in [43] view of the fact that both Cowan and his attorney were fully advised as to the bankrupt's financial condition as early as November 1, 1917, and however willing the bankrupt may have been to stipulate as to the amount due by him under the several mortgages, such a stipulation should not operate to defeat his creditors and at the same time enable Mr. Cowan to have both the possession of the property and the fruits thereof from November 1, 1917, and also to charge interest on the indebtedness from January 3, 1918, until the sheriff's sale in November, 1919, and while the

referee appreciates the desire of both Mr. Cowan and his attorney to fully protect him and his lien against the property, the interest of the other creditors of this bankrupt are entitled to consideration which has not been given them in this case.

The total amount of credits which should have been allowed the bankrupt as a result of his dealings with Mr. Cowan is the sum of five thousand and thirty-eight dollars and forty-one cents (\$5,038.41) and an order is hereby made directing the said William Cowan to show cause why he should not pay over to the estate of this bankrupt the sum of five thousand and thirty-eight dollars and forty-one cents (\$5,038.41), and such order is hereby made returnable in the City of Douglas, Cochise County, Arizona, on the 8th day of March, 1920, at 10 o'clock A. M., at which time the referee will be present in the City of Douglas, at the office of Manatt and Stephenson for the purpose of hearing said matter.

Dated at Tucson, Arizona, this 16th day of February, 1920.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsements on back:] Referee's Findings and Conclusions. Filed this 16 day of February, 1920, at 10 o'clock A. M. F. H. Bernard, Referee in Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [44]

In the District Court of the United States for the
District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

**Special Appearance and Objections Filed by
William Cowan to Referee's Show Cause
Order, Dated 16th Day of February, 1920.**

Comes now William Cowan, ordered by F. H. Bernard, Referee in the above-entitled matter, to show cause why he should not pay over to the estate of the above-named bankrupt a certain sum of money, specially appearing under protest for the purposes of this plea and no other objects, to the jurisdiction both of said court and said Referee in the premises, and states herein as his grounds of objection the following:

1. That the proceeding is irregular because no petition has been filed by the Trustee relative to the matters set forth in the show cause order.

Corpus Juris, Vol. 7, page 210, section 317.

In re Ballou, 215 Fed. 810-813.

2. Because the subject matter set forth in the show cause order shows clearly that fact, and the said William Cowan does assert title to the sums of money asked to be accounted for therein; and the said William Cowan claims said funds as his own and adversely to the Trustee and to the estate of the bankrupt.

Babbitt vs. Dutcher, 216 U. S. 102-113.

Jaquith vs. Rowley, 188 U. S. 620.

3. Because the said William Cowan does not

consent that the matters involved in the show cause order shall be heard before said Referee and further alleges that the statement of facts set forth in said show cause order do not lay foundation for a summary proceedings, but, on the contrary, disclose that the personal property which is the subject of the said Referee's findings of fact and conclusions of law, was held under liens of mortgages, for valuable consideration, given by the bankrupt more than 4 months prior to the date of his adjudication in bankruptcy, and in no event less than approximately two years prior to said adjudication. [45]

4. Because the Referee's findings of fact and conclusions of law upon which his show cause order is based are erroneous in fact and in law, and are inequitable and unjust.

(a) Because the said William Cowan has taken charge of, fed and cared for the cattle which constitute the greater part of the chattels involved, and has improved the condition and increased the number thereof, and said cattle thus improved in condition and increasing in number 30% were included in and sold under the foreclosure sale; because said Cowan is entitled to interest on the amount of his judgment; because the automobile mentioned by the Referee was said Cowan's property, and the mortgages thereon not included in the amount of the judgment.

(b) Because the Trustee has failed for a period of nearly two years to redeem the property from the mortgages of said Cowan, although every opportunity was given to him to do so.

(c) Because the Trustee in this cause has twice brought action against the said William Cowan in the State Courts. In the first, seeking to recover from said Cowan the value of the property upon which the accounting requested in the show cause order is based, same also being an action for account and numbered 2818 on the Docket of the Superior Court for the County of Cochise, State of Arizona, and entitled "John P. Cull, Trustee, vs. William Cowan," and in the second action attempting to enjoin the said William Cowan from selling under his judgment of foreclosure, said suit being entitled "John P. Cull, Trustee, vs. William Cowan, Earl McKinney and James McDonald, Sheriff of Cochise County, numbered 2861 on the Docket of said Superior Court, reference to both of which actions is hereby made; and because after the said William Cowan had demurred to both of said actions, and the demurrers to both actions had been sustained by said Superior Court, and after a notice of appeal had been given by the said John P. Cull, Trustee, to the Supreme Court of the State of Arizona, against the will and without the consent of the said William [46] Cowan, the said Trustee dismissed both of said actions; that the actions of said Trustee relative to the said William Cowan in all of said matters is malicious, inequitable and unjust, and has caused the said William Cowan to expend large sums of money in the employment of

counsel to defend said actions in said Superior Court.

Corpus Juris 7, page 259.

Wall vs. Cox, 181 U. S. 244.

Robinson vs. White, 97 Fed. 33.

(d) Because the Referee in the statement of facts upon which he based his conclusions of fact has shown clearly that this is a matter that cannot be litigated as a summary matter before him.

WILLIAM COWAN,

By His Attorney, David Benshimol.

[Endorsements on back:] Filed this 9th day of March, 1920, at 10:30 o'clock A. M. F. H. Bernard, Referee in Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [47]

In the District Court of the United States, for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Order Overruling Petition of Trustee.

At a Court of Bankruptcy held in the City of Tucson, County of Pima, State of Arizona, on the 8th day of May, 1920. Present, F. H. BERNARD, Referee.

It appearing that William Cowan has appeared herein on the 9th day of March, 1920, in response to an order to show cause and that such appearance was made specially for the purpose of objecting to

the jurisdiction of this Court to hear and determine the matters set out in said order to show cause, and it further appearing that the claim of William Cowan to the proceeds of the sale of certain property is adverse to the claim of the Trustee thereto—

IT IS ORDERED that the petition of the Trustee herein asking for an order requiring the said William Cowan to turn over all the proceeds of the sale of the property of the bankrupt to said Trustee, be, and the same is, hereby denied for want of jurisdiction of the Referee to hear and determine the claim of said William Cowan to such proceeds.

F. H. BERNARD,
Referee in Bankruptcy. [48]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Certificate by Referee to Judge.

I, F. H. Bernard, one of the Referees of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose appurtenant to the said proceedings:

“Whether on the record of this case William Cowan, the respondent to a petition filed herein by the Trustee and who has appeared especially herein to interpose a preliminary objection to the jurisdiction of this Court, is an adverse

claimant to the funds resulting from the sale of certain property formerly belonging to the Bankrupt, and which proceeds are claimed by the Trustee as part of said Bankrupt's estate."

I hand up herewith a summary of the testimony and evidence relating to the question and the findings of the Referee thereon.

And the said question is certified to the Judge for his opinion thereon.

Dated at Tucson, Arizona, this 17th day of May, 1920.

F. H. BERNARD. [49]

**Statement of Testimony of William Cowan Taken
Upon His Examination Before the Referee
Herein on December 22, 1919.**

Cowan had loaned various sums of money to Earl N. McKinney, the bankrupt herein, and these transactions began in the year 1914 and continued for several years thereafter and were represented by notes and mortgages given by McKinney as set out in detail in the complaint filed by Cowan against McKinney in the Superior Court of Cochise County, Arizona, in January, 1918. In this case judgment was rendered in favor of Cowan in pursuance to a confession of judgment filed by McKinney on January 8, 1918, after an agreement had been reached between Cowan and McKinney as to the amount due by McKinney. The formal judgment in this case was filed and signed on December 16th, 1918.

In the early part of December, 1917, McKinney turned over to Cowan all property covered by the several mortgages and under arrangements had

between them, McKinney was to receive a salary of \$150.00 a month out of the dairy business formerly operated by him. Cowan took charge of and operated the business and took over the property of McKinney from that time on and paid McKinney his salary until the latter left Douglas in the month of April, 1918.

Cowan also received various amounts from the sale of cattle by McKinney as follows:

May 6, 1916.....	\$ 581.50
September 30, 1916	543.00
September 30, 1916	1300.00
<hr/>	
Total.....	\$2424.50

Which amounts he credited on McKinney's indebtedness, retiring one note for \$450.00 dated June 6th, 1914, and one note for \$463.66 dated May 22, 1916, and he also paid insurance on the property, the premium thereof amounting to \$222.50. A further sum of \$619.35 was received by Cowan from the sale of the "Dairy Lunch," formerly belonging to McKinney, and from the proceeds thereof Cowan paid an item of \$97.55 for furniture purchased by McKinney and applied balance of such moneys or the sum of \$521.80 on a certain note for \$460.00 given to him by McKinney. [50]

The contract or agreement for purchase of what was known as the 20th Street property was assigned by McKinney to Cowan, after the former had made two small payments thereon and Cowan paid out of his personal fund the balance of the purchase price of said property. No funds of the ranch milk ac-

count were used by Cowan in the purchase of this property.

A number of hogs on the ranch were owned by McKinney before Cowan had taken over the property and there were only three hogs on the ranch when Cowan took it over.

As to the auto-truck owned by McKinney, he turned over to Cowan on December 12th, 1917, when Cowan paid off the attachment on this truck.

Cowan also paid certain taxes on the property for the years 1914-15-16 and 17. Total taxes amounted to \$885.71, which amount was taken into account in the computation of the interest due by McKinney. Judgment was taken against him under the stipulation or confession previously referred to.

Cowan thereupon handed to the Referee a statement of the salary account of McKinney and agreed to give the referee a copy of the letter written to him by McKinney, December 12, 1917, turning over all property to Cowan.

Cowan purchased all the personal property under the foreclosure proceeding at a sale thereof on November 25, 1919, for the sum of \$15,735.55, and he purchased the real property under such proceedings on November 28, 1919, for the sum of \$8,612.79. Cowan states that he owes nothing whatever to McKinney and claims the proceeds of the sale as his own property.

[Endorsements on back:] Filed Jul. 19, 1921.
C. R. McFall, Clerk. By Lella Spence, Deputy.
[51]

In the District Court of the United States for the
District of Arizona.

No. B-31—TUCSON.

In the Matter of EARL N. McKINNEY, Bank-
rupt.

**Order for Return of Files to Referee With
Instructions.**

It is ordered that the clerk of this court return the papers and files in this case to the Referee in Bankruptcy at Tucson, with instructions to proceed to decide the questions involved without the advice of the Court.

I, C. R. McFall, clerk of the above-entitled court, hereby certify that the above and foregoing is a true copy of an order of court entered on the minutes, in the above-entitled matter, this 26th day of June, 1920.

WITNESS my hand and the seal of said court affixed this 26th day of June, 1920.

[Seal]

C. R. McFALL,
Clerk.

[Endorsements on back]: Filed June 28th, 1920.
F. H. Bernard.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By
Lella Spence, Deputy. [52]

In the District Court of the United States for the
District of Arizona.

IN BANKRUPTCY—No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bank-
rupt.

Record of Proceedings Had Before Referee.

RECORD OF PROCEEDINGS HAD BEFORE
F. H. BERNARD, REFEREE IN CHARGE
OF THE ABOVE-ENTITLED MATTER.

1918.

April 12th, Received from the United States
District Court at Tucson, Ari-
zona, the following documents:
Order of Adjudication and Ref-
erence, two copies of schedules.
Filed same.

Ordered notice to creditors of
meeting on April 25, 1918, at
10 A. M. Mailed notice to cred-
itors and copy of notice to Bis-
bee Daily Review for publica-
tion.

“ 17th. Filed publisher's affidavit of pub-
lication of notice of first meet-
ing of creditors.

“ 25th. First meeting of creditors held.
Present, Earl N. McKinney, the
bankrupt, O. T. Richey, repre-
senting the Bankrupt, George

1918.

M. Roark, attorney for creditors, and T. H. McKinney, a creditor.

Upon the call for claims, the following claims were filed and being duly proved were allowed:

D. M. Dwyer.....	\$187.00
Barnhart & Carson..	490.00
J. E. Hood.....	331.37
C. M. Seaman.....	54.95
D. P. Dwyer.....	396.60
Charles R. Scott.....	110.50
L. A. Smith.....	1818.80
John P. Cull.....	106.50
Thomas H. McKinney.	86.40
I. H. Maddux.....	155.90
The China Palace Co.	106.55
Jacob Scherrer.....	600.00

Upon the call for the election of a Trustee, John P. Cull of Douglas, Arizona, was unanimously elected Trustee and his bond fixed in the sum of \$500.00 until further order of the Trustee.

The following gentlemen were then appointed Appraisers: B. A. Packard, E. C. Piper and G. O. Bohanan, all of Douglas, Arizona. [53]

April 25th.

No examination of the bankrupt being desired at this time, the

1918. meeting was continued until
May 10th, 1918, at 2 P. M.
Notified Trustee of his appointment.
- “ 27th. Received and filed acceptance of
appointment by Trustee.
- “ 30th. Filed bond of Trustee and order
approving same with the Clerk
of the United States District
Court, at Tucson, Arizona.
- May 3d. Filed proof of debt of A. Salem
for \$24.10.
- “ 9th. Filed proof of debt of H. H.
Hotchkiss for \$257.83.
- “ 10th. Continued meeting of creditors
held. No creditors present.
Allowed the following claims:
A. Salem.....\$24.10
H. H. Hotchkiss.....257.83
Meeting continued until June
21, 1918, at 2 P. M.
- “ 11th. Filed proof of debt of Douglas
Vulcanizing Company, for
\$53.65.
- “ 16th. Filed proof of debt of National
Engraving Company, for \$22.99.
- “ 22d. Filed proof of debt of John Deg-
nan for \$70.20.
- June 21st. Continued meeting of creditors
held. No creditors present.

1918. Allowed the following claims:
 Douglas Vulcanizing
 Company... ..\$53.65
 National Engraving
 Company... .. 22.99
 John Degan..... 70.20
 Meeting continued until July 20,
 1918, at 2 P. M.
- July 6th. Filed proof of debt of W. M. Mc-
 Coy for \$52.25.
- “ 17th. Filed proof of debt of The McNeil
 Company for \$140.00.
- “ 20th. Meeting continued to August 21st,
 1918, at 2 P. M.
- August 3d Filed the following claims:
 John P. Cull.....\$106.95
 Henry Elvey..... 24.80
 Safford Hay & Grain
 Co..... 60.00
 Bassett Lumber Com-
 pany..... 39.80
 Bassett & Frist..... 86.25
 Filed report of Trustee. [54]
- August 21st. Meeting of creditors continued to
 September 21st, 1918, at 2 P. M.
- September 14th. Filed proof of debt of Lane Broth-
 for \$100.00.
- “ 21st. Meeting continued to October 21st,
 1918, at 2 P. M.
- October 1st. Had a long interview with John P.
 Cull, Trustee, and C. V. Manatt,
 Attorney, in City of Tucson, re-

1918. regarding the examination of the Bankrupt and also of William Cowan and David Benshimol, his attorney.

“ 4th. Filed supplemental report of Trustee.

“ 11th. Made and entered order for further examination of the Bankrupt, and also for examination of William Cowan and David Benshimol, both of Douglas, Arizona.

Obtained Subpoenas from the Clerk of the United States District Court for William Cowan and David Benshimol and mailed same with Deputy United States Marshal at Bisbee for service.

Examination of these parties set for October 21st, 1918, at 9:30 A. M. in Douglas, Arizona.

“ 21st. Meeting of creditors held at Douglas, Arizona. Present, Earl N. McKinney, the Bankrupt, John P. Cull, Trustee, C. V. Manatt, attorney for Trustee and David Benshimol.

Allowed the following claims:

W. M. McCoy.....\$52.25

The McNeil Company.140.00

1918.	John P. Cull.....	106.95
	Safford Hay & Grain	
	Co.....	60.00
	Bassett Lumber Com-	
	pany.....	39.80
	Bassett & Frist.....	86.25
	Henry Elvey....	24.80

Filed return of service of Subpoenas upon David Benshimol and William Cowan.

It appearing that William Cowan has failed to appear in pursuance of the Summons issued, the hearing of the testimony of the bankrupt was then taken up and the statements of his testimony appear of record herein on the date of October 30th, 1918.

The attorney for the Trustee announced that he did not care to examine Mr. Benshimol until he had an opportunity of examining Mr. Cowan and the examination was therefore continued until 2 o'clock. [55]

October 21st. At 2 P. M. Present, John P. Cull, Trustee, Earl N. McKinney and C. V. Manatt, attorney for Trustee.

It appearing that Mr. Cowan had failed to respond to the summons issued herein and it

1918.

also appearing that the United States Marshal had failed to tender Mr. Cowan his fees and mileage, the examination of Mr. Cowan was continued until some future date, as was likewise the examination of Mr. Benhsimol.

Meeting continued until November 21st, 1918, at 2 P. M.

“ 30th. Filed statement of testimony given by Earl N. McKinney, the bankrupt, at the hearing on October 21st, 1918.

November 21st. Meeting continued until further notice.

“ 25th. Filed special report of the Trustee requesting an order to bring suit against William Cowan and made and entered order authorizing the Trustee to file suit.

1919.

December 5th. Filed report of Trustee.

“ 15th. Made and entered order for the examination of William Cowan, such examination to be held in the City of Douglas, on December 22d, 1919, and caused subpoena to be issued and handed to United States Marshal for service.

1919.

- “ 20th. Filed Marshal's return of service of subpoena on William Cowan.
- “ 22d. Meeting held in Douglas, Arizona, for the purpose of examining William Cowan in pursuance to subpoena issued on December 15th. Present, William Cowan, David Benshimol, his attorney, John P. Cull, Trustee, and C. V. Manatt, attorney for Trustee.

William Cowan was thereupon examined and a statement of his testimony is filed herein.

Upon the conclusion of the testimony of William Cowan, the meeting was continued until further notice.

1920.

February 16th. Filed Referee's findings and conclusions and made and entered order requiring William Cowan to show cause before the Referee in Douglas on March 8th, 1920, why he should not turn over certain property to the Trustee.

Made copy of order to show cause to David Benshimol, attorney for Cowan, and copy to C. V. Manatt, attorney for Trustee. [56]

1920.

March 6th.

Made and entered order continuing hearing on the order to show cause until March 9th, 1920, 10 A. M.

“ 9th.

Hearing upon return of order to show. Present, William Cowan, David Benshimol, attorney for William Cowan, John P. Cull, Trustee, and C. V. Manatt, attorney for Trustee

Filed objection of William Cowan to the jurisdiction of the Referee herein to hear and determine his claim against the estate of this bankrupt, and the matter so submitted was taken under advisement.

David Benshimol, attorney for Cowan, stated that he desired to be heard before the United States Court on the question of jurisdiction of the Referee in the event that this question was certified up to the District Judge.

It appearing that an item of Three Hundred Dollars (\$300.00) for an automobile belonging to the bankrupt and by him delivered to William Cowan, was contained in the order to show cause, requiring Cowan to

1920. pay over certain sums to the Trustee and it further appearing that this item was not included in the Judgment rendered in the Superior Court in Cochise County in the suit to foreclose certain mortgages brought by William Cowan against Earl N. McKinney, the Bankrupt.

It is ordered that the order to show cause heretofore issued and filed on the 16th day of February, 1920, be and the same is hereby amended so as to strike therefrom the paragraph requiring William Cowan to credit the estate of the Bankrupt with the sum of Three Hundred Dollars (\$300.00) and that the meeting be continued until further notice.

May 17th. Certified the question raised in this proceeding to the District Judge of the District Court of Arizona for his opinion.

June 28. Received from Clerk of U. S. District Court Order of the U. S. District Judge *instruction* Referee to proceed to decide the questions involved in this case without the advise of the Court.

1921.

- May 16. Made and filed findings of fact and conclusions of law in the above-entitled matter and mailed copy of such findings of fact and conclusions of law to David Benshimol, Esq., Douglas, Arizona, attorney for William Cowan and to C. V. Mannatt, attorney at law, Douglas, Arizona, attorney for Trustee. [57]
- July 18. Filed petition of William Cowan for a review of Referee's findings of fact and conclusions of law, dated May 16th, 1921, and allowed petition for review.
- July 19. Filed certificate of review and all papers pertinent to such review with the Clerk of U. S. District Court, at Tucson, Arizona.

[Endorsements on back]: Filed Jul. 19, 1921.
C. R. McFall, Clerk. By Lella Spence, Deputy.
[58]

In the District Court of the United States in and
for the District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Referee's Findings of Fact and Conclusions of Law.

ON WILLIAM COWAN'S CITATION.

That after thorough investigation of the matters
of the above estate I find the following facts:

I.

That the estate of the bankrupt, at the time of
filing his petition and the adjudication thereon by
the Court, consisted of lands, dairy stock and range
stock in Cochise County, State of Arizona, esti-
mated to be of a value of from \$19,000.00 to \$30,-
000.00, and for some time prior to the bankrupt
proceedings this land and stock had been left with
William Cowan, who claimed to have certain mort-
gage liens on all the said property, which said liens
on investigation were, so far as this proceeding is
concerned, in existence and of record for more
than four months prior to these proceedings.

II.

That the arrangement between the bankrupt and
Cowan was substantially, that Cowan was to have
and remain in possession of and run the business
with the bankrupt employed, in the active business,
until such time as the business should pay off Cow-
an's indebtedness, and then the property involved
was to be turned back to the bankrupt, as his own
free and clear of all liens, in so far as Cowan was

concerned, and this arrangement was carried out, in so far as turning over the property to Cowan, and the employment of the bankrupt, up to a short time before the bankrupt filed his petition in bankruptcy in this court, and more than four months after the arrangement was had and made, this arrangement being abrogated and abandoned by the bankrupt owing to dissatisfaction on his part. [59]

III.

That Jan. 2d, 1918, and during the time that the arrangement set out in paragraph two hereof was in force and being worked out by the parties concerned, William Cowan, through his attorney David Benshimol, started suit in the Superior Court of Cochise County, State of Arizona, to foreclose the various mortgages held by Cowan on the property of the bankrupt, and on the 8th day of January, 1918, under a confession by bankrupt obtained by Cowan and his attorney, and on this suit and on the said confession an entry was made by the Court, and as a part of the Court's minutes that on presentment of a proper written judgment, judgment would be entered in favor of plaintiff Cowan and against defendant Earl N. McKinney, the bankrupt, as follows: Principal sum due \$16,260.00; interest \$3,641.68; interest on that sum at the rate of 10% and allowed an attorney's fee to David Benshimol in the sum of \$500.00 and the costs of suit, and that execution may issue against the property foreclosed, and that no further proceeding was had on said matter until about a year later, when the formal written judgment was entered, dated Dec. 16, 1918,

and signed by Alfred C. Lockwood, Judge, and the Trustee obtained a temporary restraining order, restraining the sheriff of Cochise County from selling the property, which said restraining order was in a short time dissolved, and by order of sale issued on the 25th day of November, 1919, the personal property of the bankrupt was sold at sheriff's sale to William Cowan for the sum of \$15,736.55, and on the 28th day of November, 1919, the real estate was sold to Cowan for the sum of \$8,612.79 making a total sum received for the property on such sales of \$24,349.34, being the sum due Cowan on his judgment with 10% interest from Jan. 8th, 1918, and during all this time from the 8th day of Jan. 1918, and prior thereto for about four months Cowan had been in full possession of all the property and enjoyed the proceeds therefrom, without giving any credit on the judgment for the use of the property, and charging full interest up to the day of sales. [60]

IV.

That the Trustee has charged that Cowan failed to give credit to the bankrupt, for checks sent him on sales of cattle made by the bankrupt, and failed to give credit to the bankrupt for different properties taken over by Cowan, and so under said charges and allegations of the Trustee I on or about the 12th day of Dec. 1919 had Cowan subpoenaed to appear before me on December 22d, 1919, at Douglas, Arizona, for examination, where he, Cowan, appeared and submitted to examination by myself, and from such examination I found that during

the year 1916 the bankrupt had sold stock presumably covered by Cowan's mortgages in the sum of \$2,424.50, which the Bankrupt Cowan admitted had turned over to him said amount of \$2,424.50 from such sales of stock and in an examination of Cowan he could only show where he had credited the bankrupt with the sum of \$1158.92, leaving a balance unaccounted for which Cowan admitted he had received of \$1265.58.

V.

That during all the time Cowan allowed his Court proceedings to remain idle, he was in the possession of and had the use of the entire property of the bankrupt, and when the sheriff's sales were had in Nov. 1919, said Cowan bid in the property for the sum of \$24,349.34, that being the amount due Cowan on his judgment with 10% interest from its date to the date of sales, and as a fact the use and benefits of the property as had by Cowan should have more than paid the interest, especially the delay in selling the property was from the fault of said Cowan, and the accumulated interest during that time would amount to the sum of \$3,439.97, and the Referee finds that Cowan should account for the bankrupt's estate or the trustee for the further sum of \$3,439.97.

VI.

That from the showing and testimony of said Cowan at such hearing, I came to the conclusion that the foreclosure of the court inculding the automobile in said matter in the Superior Court of Cochise County, Arizona, was not a *bona fide* trans-

action, and held [61] that Cowan should account for the value of the automobile in the sum of \$300.00, and on said hearing made specific findings, and issued a citation thereon and served the same on Cowan to show cause why he should not pay in to the Trustee the total sums so found due from him for money and property had and received, from the bankrupt estate, and not credited and accounted for, and said citation held him to appear before me at the City of Dougals, Arizona, on the 9th day of March, 1920, at which time and place said Cowan appeared, with his attorney, and proceeded to make a showing why he should not account for the value of the automobile in the sum of \$300.00, among other things, which he asked for relief and upon his showing I reduced my findings in the sum of \$300.00, as he was able to show that he had an assignment of the rights to the automobile in his paying the cost of the claims and suit in attachment against it.

VII.

That he appeared therein and plead to the merits of said citation and obtained affirmative relief thereon, and at the same time he objected to the jurisdiction of the Referee or this Court trying said matters in a summary proceeding, however having submitted himself to the jurisdiction of the Referee and this Court in the matter, as herein stated, said objection to jurisdiction and this proceeding was by the Referee overruled and the Referee found that Cowan had received and not accounted for moneys and property of the bankrupt estate, which should

have been credited on the obligations of the bankrupt, and the judgment against him in the total sum of \$4,705.55, and finds that such sum is due from said William Cowan to the trustee for the benefits of the general creditors of said estate.

On the above facts as herein found the Referee finds the following conclusions of law:

I.

That there being no property right or right to possession of property involved in this proceeding, and it being an inquiry for [62] the amount of property and money received by Cowan and unaccounted for, that this summary proceeding is proper and right, as all the rights and things herein involved is under the jurisdiction of this Court as a Bankrupt Court.

II.

That if any judicial question ever existed the same was waived by Cowan when he came in voluntarily and plead to the merits of the citation, and obtained affirmative relief under his plea and showing made as shown in the findings heretofore made.

III.

That as a matter of law Cowan has received in money and property belonging to the bankrupt estate the sum of \$4,705.55, which sum and amount so received he has failed to account for, or credited to the bankrupt or his estate.

IV.

That such sum of \$4,705.55 is the property of the estate and should be paid over to the trustee for

the benefit of the estate and distributed according to law.

V.

That said Cowan having failed to turn over or pay said sum to the trustee or anyone for him, this Court should order the matter docketed, and render judgment therefor, against said William Cowan in favor of John P. Cull, Trustee, and order execution therefor.

Done this 16th day of May, 1921.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsements on back]: Filed this 16 day of May, 1921, at 2 o'clock P. M. F. H. Bernard, Referee in Bankruptcy.

Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [63]

In the District Court of the United States for the
District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Petition for Review.

PETITION OF WILLIAM COWAN FOR A
REVIEW OF THE REFEREE'S FIND-
INGS OF FACT AND CONCLUSIONS OF
LAW ON CITATION OF THIS PETI-
TIONER DATED MAY 16, 1921.

Your petitioner respectfully represents:

1.

That he is the person named in the proceedings herein entitled "Referee's Findings of Fact and Conclusions of Law on William Cowan's Citation," dated May 16, 1921.

2.

That your petitioner prays the Honorable Court to review said proceedings and the whole thereof.

And your petitioner further represents:

3.

That the referee is without jurisdiction and that this Court is without jurisdiction to hear, consider or determine the matters sought to be adjudged in the proceedings before the Referee and this court is without jurisdiction to hear or determine any of the matters and things set forth in the Referee's Findings of Fact and Conclusions of Law dated May 16, 1921.

4.

That said Referee is without jurisdiction and the Court is without jurisdiction of the person of your petitioner in the premises.

5.

That your petitioner has not submitted himself to the jurisdiction of the Referee, nor to the jurisdiction of this Court, and has not consented that the right of property in said proceedings involved, [64] should be determined by said Referee or by this Court, upon summary proceedings herein.

6.

That your petitioner especially denies the jurisdiction of said Referee and especially denies and

objects to the jurisdiction of the Court, to proceed further herein.

7.

That said proceedings before the Referee were arbitrary and unlawful in that same were not initiated upon any petition or showing made by the Trustee.

8.

That said proceedings before the Referee and any order or findings sought to be predicated thereupon, were arbitrary and unlawful in that your petitioner's claim to the property and moneys sought to be taken by the Referee, were adverse to the bankrupt.

9.

That it appears from the findings and conclusions that the Referee is estopped for laches from asserting any claim in behalf of the bankrupt's estate, by reason of failure of the Trustee to redeem the mortgaged property.

10.

That it appears from the findings of the Referee that an attempt is made in summary proceedings to effect and adjudicate an accounting between petitioner and the bankrupt.

11.

That it appears from the findings of the Referee that an attempt is made to adjudicate matters and issues that can only be determined in a plenary action.

12.

That it does not appear from the proceedings

that this petitioner holds any property or moneys of the bankrupt as agent, representative or naked bailee. [65]

13.

That it appears from the record that the matters and things attempted to be adjudicated by the Referee are *res adjudicata*.

14.

That it appears from the proceedings and from the record that all matters and things over which the Referee attempts to exercise jurisdiction, have been determined in a plenary action in a court of competent jurisdiction.

And your petitioner further represents:

15.

That all moneys and property of every nature and kind whatsoever received by him from said bankrupt or of and from the proceeds of sale upon foreclosure of mortgages are declared by your petitioner to be his own, and the same are now and at all times have been held adversely to said bankrupt.

16.

That it appears from the record that a real adverse claim to the property sought to be reached exists in favor of the petitioner.

17.

That there is no evidence in the record to support the findings of the Referee and said findings do not support the conclusions of law reached by said Referee.

18.

That all the acts, proceedings, orders and findings,

so made by the Referee are void and of no effect, and same appears upon the face of the record.

And your petitioner further represents:

19.

That John P. Cull, the duly qualified and acting trustee herein did on November 30, 1918, file his certain action in the Superior Court of the State of Arizona, in and for Cochise County, a court of competent jurisdiction, against this petitioner, said cause being numbered 2818, a certified copy of the record whereof is hereto attached, marked Exhibit "A" and made a part of this petition by reference. [66]

That in said action next before referred to the said Trustee sought an accounting of the defendant in respect to all the matters and things sought to be determined by the Referee in these proceedings, and in which said action the petitioner joined issue by filing his demurrer and answer, and that the issues and matters and things in said action referred to were on May 17, 1919, adjudicated in favor of this petitioner and against said Trustee, and judgment therein in favor of your petitioner has become final.

20.

That John P. Cull the duly qualified and acting trustee herein did on the 8th day of Jan. 1919, file his certain action in the Superior Court of the State of Arizona, in and for Cochise County, a Court of competent jurisdiction, against this petitioner and against the sheriff of Cochise County, said cause being numbered 2961, a certified copy of the record whereof is hereto attached, marked

Exhibit "B" and made a part of this petition by reference.

That in said action next before referred to, the said trustee sought to restrain this petitioner and the sheriff of Cochise County from proceeding with the sale under judgment, rendered in mortgage foreclosure proceedings against the properties of the said bankrupt, and setting forth in his said complaint all the matters, things and issues sought to be determined by the Referee in these proceedings and praying for an accounting between the petitioner and said bankrupt in respect to the matter and things considered and attempted to be determined by the Referee in these proceedings, and in which said action this petitioner joined issue by filing his demurrer and answer, and that said restraining order was denied after due proceedings had thereon, vacated and dissolved and thereupon the said Trustee did on Nov. 18, 1919, move the Court to dismiss the said action, and said litigation was terminated in favor of this petitioner and judgment thereon has become final.

21.

That this petitioner excepts to all the acts and doings of the said Referee herein, in this regard, for the reasons hereinbefore [67] set forth.

22.

That your petitioner demands that these proceedings be referred to the United States District Court for the District of Arizona for review.

WHEREFORE your petitioner prays this Honorable Court that all proceedings of the Referee

herein be declared void and that your petitioner go hence without delay.

WILIAM COWAN,
By DAVID BENSHIMOL,
Attorney for Petitioner.

[Endorsed on back:] Filed this 18th day of July, 1921, at 2 o'clock P. M. F. H. Bernard, Referee in Bankruptcy. [68]

Exhibit "A."

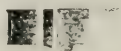
In the Superior Court in the State of Arizona, in
and for the County of Cochise.

2818.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARLE N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN,



Defendant.

COMPLAINT.

The plaintiff complains of the defendant and alleges:

I.

That heretofore, to wit, on or about the 9th day of April, 1918, Earle N. McKinney filed in the District Court of the United States for the District of Arizona, his petition in voluntary bankruptcy, and by judgment of said District Court of the United States as aforesaid was on or about the 26th day of

April, 1918, adjudged a bankrupt and that thereafter and in due course of the administration of the estate of said bankrupt the plaintiff John P. Cull was by proper order and judgment of said United States Court appointed Trustee in Bankruptcy for the estate of the said Earl N. McKinney, bankrupt as aforesaid, and ever since has been and is now the duly appointed, qualified and acting Trustee in Bankruptcy for said estate and as such Trustee in Bankruptcy brings this action for the use and to the benefit of said bankrupt estate and the unsecured creditors thereof.

II.

That the defendant is a resident of the County of *Cochis*, State of Arizona, and that all the real and personal property involved in this litigation is situated in said county and state.

III.

That prior to and at the time the said Earl N. McKinney became a bankrupt as aforesaid he was the owner in fee simple of the following described real and personal property situate and being in Co-chise County, State of Arizona, to wit: The Northwest Quarter of Section 31 Township 23, South of Range 28 East of the Gila and Salt River Base and Meridian, together [69] with the improvements, equipment and fixtures thereon, all of which was and is of the value of fifteen thousand (\$15,000.00) dollars lawful money of the United States; also the South half of the Northwest Quarter and the West Half of the Northeast Quarter of Section 29, Township 23 South of Range 28 East of the Gile and

Salt River Base and Meridian, together with the improvements thereon, all of which said property is and was of the value of two thousand (\$2000.00) Dollars, lawful money of the United States; also Lots 1 and 2 and the South Half of the Northeast Quarter of Section 1, Township 24 South, of Range 27 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, which said property was and is of the value of two thousand (\$2,000.00) dollars, lawful money of the United States; also the Southwest Quarter of Section 29 Township 23 South of Range 28 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, which said property was and is of the value of two thousand (\$2,000.00) dollars, lawful money of the United States; also the West Half of the Southeast Quarter of the East Half of the Southwest Quarter of Section 30, Township 23 South of Range 28 East of Gila and Salt River Base and Meridian, which said property is and was of the value of one thousand five hundred (\$1,500.00) dollars lawful money of the United States; also a lease from the State of Arizona for a term of 5 years on Section 36, Township 22 South of Range 26 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, which said property was and is of the value of five hundred (\$500.00) dollars lawful money of the United States; also household goods and furniture in the house upon the tract of land first above described which was and is of the value of two hundred and twenty-five (\$225.00) dollars

lawful money of the United States; also 100 head of dairy cows in the dairy upon the lands above described which said cows were and are of the value of one hundred and twenty-five (\$125.00) dollars each [70] and a total value of twelve thousand five hundred (\$12,500.00) dollars lawful money of the United States; also 150 head of young dairy cattle upon the lands above described which said cattle were and are of the value of seven thousand five hundred (\$7,500.00) dollars lawful money of the United States; also 10 horses and 2 mules used in connection with the dairy business upon the land above described, which were and are of the value of one thousand two hundred (\$1,200.00) dollars lawful money of the United States; also 3 wagons upon the land above described of the value one hundred and seventy-five (\$175.00) dollars lawful money of the United States; also one automobile truck used in connection with the dairy business on the above-described lands which said truck was and is of the value two hundred (\$200.00) dollars lawful money of the United States; one buggy on the lands above-described of the value of twenty-five (\$25.00) dollars; 2 sets of harness at the dairy and on the lands above-described of the value of forty-five (\$45.00) dollars lawful money of the United States; also plows, mowing machines, farming tools and implements on the above-described lands of the value of six hundred and seventy-five (\$675.00) dollars, lawful money of the United States; also 15 head of hogs at the dairy on the lands above-described, which said hogs were and are of the value of one hundred and

fifty (\$150.00) dollars, lawful money of the United States of America; also the Little Dairy Lunch business located on 10th Street between G and F Avenues, in the City of Douglas, Cochise County, Arizona, which said business was and is of the value of one thousand (\$1,000.00) dollars, lawful money of the United States; also 1 lot and house situate some place on 20th Street in the City of Douglas, Cochise County, State of Arizona; the exact discription of said lot and house is to plaintiff unknown, and that diligent inquiry on the part of plaintiff has failed to reveal [71] the same; that the discription of this property is known to the defendant to this action; that plaintiff is unable to get the proper discription of this property except upon discovery in this suit; that plaintiff is informed and believes and therefore alleges that this property was and is of the value of seven hundred and fifty (\$750.00) dollars, lawful money of the United States; that all of the property so owned by the said Earl N. McKinney as aforesaid and above-enumerated and set forth was and is of the value of forty-eight thousand four hundred and seventy-five (\$48,475.00) dollars, lawful money of the United States.

IV.

Plaintiff says that he is creditably informed and believes and therefore alleges that the defendant, William Cowan, claims mortgage liens on all or certain portions of the above-described property in the sum of and to the amount of twenty thousand four hundred and one dollars and sixty-eight cents (\$20,401.68); and plaintiff further says that he is cred-

itably informed and therefore alleges that various and sundry large sums of money have been paid by the said Earl N. McKinney to the said William Cowan on account of the aforesaid mortgage liens, and should be credited on same; that said amounts and credits do not appear on the records, and that plaintiff has made a diligent effort and can not ascertain the exact amounts and dates thereof but that said credits are approximately three thousand (\$3,000.00) dollars, lawful money of the United States; that the dairy cows and dairy cattle included within and covered by defendant, Cowan's mortgage lien as aforesaid has long since been sold by the said Earl N. McKinney, bankrupt, as aforesaid and replaced by other dairy cows and dairy cattle and that but 10 head of dairy cows remain and are included in the dairy cows and dairy cattle set forth in paragraph 3 of this complaint upon which the defendant William [72] Cowan has a mortgage, and that were included in the mortgage given to the said William Cowan by the said Earl N. McKinney that the plaintiff has made diligent effort and that he is unable to identify the dairy cows and dairy cattle which are included in said mortgage and those which are not included therein; that the Referee in Bankruptcy for the District Court of the United States for the District of Arizona and before whom these bankruptcy proceedings are pending had the defendant, William Cowan, regularly subpoenaed to appear before him and give testimony concerning the above things and matters, but that the said defendant, William Cowan, failed and refused to obey said sub-

poena; that this plaintiff is in need of the assistance of this court in the premises.

V.

Plaintiff further says that he is reliably informed and believes and therefore on such information and belief alleges that one of the aforesaid mortgages for which the defendant, William Cowan, claims a *lien* on the property of the said Earl N. McKinney for the sum and in the amount of three hundred (\$300.00) dollars is and was from its inception bogus and fraudulent, and that no consideration whatever was ever given by the defendant William Cowan to the said Earl N. McKinney bankrupt as aforesaid for the same or on account of the same; that said mortgage was knowingly and designedly made for the purpose of covering up the property of the said Earl N. McKinney and hindering, obstructing and delaying the creditors of the said Earl N. McKinney in collecting their debts.

VI.

That heretofore, to wit, on or about the 20th day of November, 1917, and before the institution of the proceedings in bankruptcy in the United States Court as aforesaid by the said Earl N. McKinney, the defendant William Cowan did knowingly, designedly, and intentionally, and with intent then and there to defraud the creditors of the said Earl N. McKinney enter into a fraudulent design and scheme with the said Earl N. McKinney, and did pursuant thereto have a verbal agreement and understanding with the said Earl N. McKinney that he the said defendant, William Cowan, take over all the property

set forth and described in paragraph 3 of this complaint, and of the then value of forty-eight [73] thousand four hundred and seventy-five (\$48,475.00) dollars, lawful money of the United States, and that the defendant William Cowan cover the same up from the other creditors of the said Earl N. McKinney, and that he the said William Cowan in furtherance of said scheme and design place a man in charge of said property to act jointly with the said Earl N. McKinney that said defendant, William Cowan, was to collect rents, issues and profits of said property, and the dairy business run in connection therewith and apply the same to the discharge of the mortgage leins he had against said property or portions thereof, and that after his debts were all paid he was to return all of said property to the said Earle N. McKinney; that on or about said date and pursuant to said agreement and understanding the said defendant William Cowan did place a man jointly in charge of said property and business with the said Earl N. McKinney, and thereafter he did tell and make known to the creditors of the said Earl N. McKinney that he was the owner of said property and business, and he did collect and take for his own use all rents, issues and profits of said property, and the proceeds of said dairy business; and in furtherance of said scheme and design to defraud the creditors of the said Earl N. McKinney the said defendant, William Cowan, did thereafter institute in the Superior Court of Cochise County, State of Arizona, and action to foreclose said mortgage leins aforesaid including the one made and executed without consideration for the

sum of three hundred (\$300.00) dollars, and did knowingly, designedly, and fraudulently, and with intent to cheat and defraud the creditors of the said Earl N. McKinney procure the said Earl N. McKinney to make and enter a confession of judgment in said action for the sum and amount of twenty thousand four hundred and one dollars and sixty-eight cents (\$20,401.68) which said sum and amount did not allow [74] any creditors which had been paid thereon by the said Earl N. McKinney as hereinbefore alleged, which said fact was well known by the said defendant, William Cowan, at the time he procured and had said confession of judgment entered in said action; that thereafter and on or about the 1st day of April, 1918, the said defendant, William Cowan, in furtherance of said scheme and design to cheat and defraud the creditors of the said Earl N. McKinney, and with intent to cheat and defraud the same, did, wilfully, intentionally, designedly, and without authority of law, forcibly oust the said Earl N. McKinney from the control and possession of all of the real and personal property set up and described in paragraph 3 of this complaint, and did appropriate the same to his own use and benefit, said property being of the then value of forty-eight thousand four hundred and seventy-five (\$48,475.00) dollars, lawful money of the United States, and ever since said date has continued in the possession and to exercise control over said property and all thereof, and to use it as his own and to receive the rents, issues and profits of the same. That this plaintiff has no way of knowing what the rents, issues and

profits of said property has been since they have been so taken by the defendant, William Cowan; that all the books, papers, and records showing the same are in the possession of the defendant, William Cowan, who refuses to give this plaintiff access thereto.

VII.

That since the defendant, William Cowan, took over said property as aforesaid he has failed and neglected to properly care for and cause to be cared for the said dairy cows, and dairy cattle, and that the same have become poor and have greatly reduced in value; that he has removed some of the fences placed around the real property so taken over and has altered and changed the buildings and other improvements [75] on said real estate, and has greatly wasted the same; that the parties cannot be placed *in statu quo* by the return of said property.

WHEREFORE, the plaintiff prays that an accounting be had in this court between the plaintiff and defendant; that the amount due the said defendant, William Cowan, by Earl N. McKinney, a bankrupt, be determined by judgment of this Court; that the plaintiff have and recover judgment against the defendant, William Cowan, for the sum of forty-eight thousand four hundred and seventy-five (\$48,475.00) dollars, lawful money of the United States, less any amount that may be justly due the defendant, William Cowan, on account of claims against the said Earl N. McKinney, after a proper accounting in this court; that the title of said prop-

erty and all thereof be determined and disposed of by proper decree of this Court; that all matters between the parties be fully determined and disposed of by decree of this Court; that the plaintiff have and recover of and from the defendant his costs herein expended; and that the Court make all such further orders and decrees in the premises as may be just and *quitable* between the parties.

MANATT & STEPHENSON,
Attorneys for the Plaintiff.

[Indorsed on the back:] Filed Nov. 30, 1918.
J. E. James, Clerk Superior Court. By H. P. Johnson, Deputy. [76]

In the Superior Court in the County of Cochise,
State of Arizona.

2818.

Action brought in the Superior Court of the State of Arizona, in and for the County of Cochise and the Complaint filed in the said County of Cochise, in the office of the Clerk of said Superior Court.

JOHN P. CULL, Trustee in Bankruptcy of the Estate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN,

Defendant.

THE STATE OF ARIZONA SENDS GREET-
ING: William Cowan.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the Superior Court of the State of Arizona, in and for the County of Cochise, and to answer the complaint filed therein within twenty days (exclusive of the day of service) after the service on you of this summons (if served within the county otherwise within thirty days) or judgment by default will be taken against you according to the prayer of said complaint.

Given under my hand and the Seal of the Superior Court of the State of Arizona, in and for the County of Cochise, this 30th day of November, in the year of our Lord one thousand nine hundred and eighteen.

[Seal]

J. E. JAMES,

Clerk.

By H. P. Johnson,

Deputy Clerk.

(On back)

State of Arizona,
County of Cochise,
Office of Sheriff,—ss.

I, Guy C. Welch, Sheriff of Cochise County, State of Arizona, hereby certify that I received the within summons on the 30th day of November, 1918, and personally served the same upon — of the defendant— named in said summons, by delivering to and leaving with [77] each of said defendants

hereinafter named, personally, at the time and place set out opposite the name of each of the said defendant—, within the County of Cochise, State of Arizona, a copy of said summons and a true and correct copy of the complaint in the action named in said summons attached to said copy of summons.

Name	Date served	Where served.
William Cowan	Dec. 3d, 1918	Ranch

Dated this 9th day of December, 1918.

GUY C. WELCH,
Sheriff.

By _____,
Deputy Sheriff.

[Endorsements]: No. 2818. Superior Court, County of Cochise, State of Arizona. John P. Cull, etc., Plaintiffs, vs. William Cowan, Defendant. Summons. Manatt & Stephenson, Plaintiff's Atty. Filed Dec. 11, 1918. J. E. James, Clerk of the Superior Court. By H. P. Johnson, Deputy. [78]

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN,

Defendant.

DEMURRER AND ANSWER.

Comes now the defendant in the above-entitled cause and demurs to the complaint because the facts

therein stated do not constitute a cause of action against this defendant.

1. Because the plaintiff in this action while asking for an accounting does not offer to do equity, i. e., offer to pay to this defendant the amount of the indebtedness due to him.

2. Because the plaintiff while seeking equity does not offer to do equity, in that it is alleged that the bankrupt Earl N. McKinney had disposed of a large number of the cattle held by this defendant under his mortgages, meaning that this plaintiff may profit by the fraud of said McKinney.

3. Because this plaintiff stands in no better position regarding the mortgaged property described in the complaint than did said McKinney.

4. Because there is no allegation in the complaint that would indicate that under said mortgages referred to in the complaint, that this defendant had no right to the possession of the property referred to, but, on the contrary, the allegations of the complaint specifically state that the said McKinney gave possession to the defendant and that this defendant took possession of certain property, and there is no allegation that the mortgages upon all of the property described in the complaint were not made in good faith and for a valuable consideration.

5. Because there is no allegation in the complaint that the mortgages referred to were made by the said McKinney within four months of the time of his adjudication in bankruptcy.

6. Because under the allegations of the complaint certain property alleged to belong to the said McKinney is under mortgage to this defendant and this plaintiff can have no interest in said property [79] except to redeem the same from said mortgages or to recover from this defendant any surplus in said property above the amount due to this defendant under his said mortgages, to the same extent only that the said McKinney would have been entitled to, in the event that said mortgages are foreclosed and the security sold.

By His Attorneys:

DAVID BENSHIMOL.

J. T. KINGSBURY.

If the foregoing demurrer is overruled then this defendant answers the complaint as follows:

I.

Admits the allegations of paragraph one and two of the complaint.

II.

Answering paragraph three of the complaint defendant:

a. Admits that Earl N. McKinney was the owner of the Northwest Quarter of Section 31, Twp. 23, S. R. 28, E. G. and S. R., B. and Meridian, and that there were improvements on said land, but denies that said land and improvements were worth the sum of Fifteen Thousand (\$15,000.00) Dollars and alleges that said land with all improvements, equipment and fixtures thereon is not and was not, at the times herein mentioned, worth more than

thirty-five hundred (\$3500.00) dollars to four thousand (\$4000.00) dollars.

b. Admits that said McKinney at the times herein mentioned was the owner of the South Half of the Northwest Quarter and the West Half of the Northeast Quarter of Section 29, Twp. 23, S. R. 28 E. G., and S. R. B. and Meridian, but denies that said property is and was of the value of Two Thousand (\$2000.00) Dollars as alleged, but believes and therefore says that said lands are not worth more than Five (\$5.00) Dollars per acre or Four Hundred (\$400.00) Dollars for the entire tract.

c. Denies that at the times herein mentioned said McKinney was the owner of Lots 1 and 2 of the South Half of the Northeast Quarter of Section 1, Twp. 24 S. R. 27 E. G. and S. R. B. and Meridian, denies that [80] said lands are worth the sum of Two Thousand (\$2000.00) Dollars.

d. Admits that at the times herein mentioned said McKinney was the owner of the Southwest Quarter of Section 29, Twp. 23, S. R. 28 E. G. and S. R. B. and Meridian, but denies that said lands were worth the sum of Two Thousand (\$2000.00) Dollars and believes and therefore says that the same are and were not worth at any of said times, more than Five (\$5.00) Dollars per acre or Eight Hundred (\$800.00) Dollars for all of said lands.

e. Admits that at the times herein mentioned the said McKinney was the owner of the West Half of the Southeast Quarter and the East Half of the Southwest Quarter of Section 30, Twp. 23 S. R.

28, E. G. and S. R. B. and Meridian, but denies that said lands were worth at any of said times the sum of Fifteen Hundred (\$1500.00) Dollars but believes and therefore says that said lands were not worth more than Five (\$5.00) Dollars per acre or Eight Hundred (\$800.00) Dollars for the one hundred and sixty (160) acres.

f. Is informed and believes and therefore says that said McKinney had at one time a lease on Section 36, Twp. 22, S. R. 26 E. G. and S. R. B. and Meridian with some improvements thereon, but denies that said lease or said improvements were of the value of Five Hundred (\$500.00) Dollars.

g. As to whether the said McKinney had any *household* goods or furniture in the house upon the tract of land described "a" above, or that the same were of the value of Two Hundred and Twenty-five (225.00) Dollars, this defendant is unable to state and therefore denies that there were any household goods and furniture in the house upon said lands and denies the alleged value thereof.

h. Admits that said McKinney had some dairy cows upon the lands described as being the Sections 29, 30 and 31 of Twp. 23, *Section* 28 E., but denies that between the dates of November 20th, 1917 and April 1st, 1918, that said McKinney had One Hundred (100) head of dairy cows upon the lands or in the dairy as set forth in Paragraph III of the complaint and denies that the dairy cattle upon said lands were of the value of One Hundred and Twenty-five (\$125.00) Dollars [81] each, but credibly informed and believes that the number of dairy

cows upon said lands was much less than One Hundred (100) head, to wit, not more than seventy (70) to eighty (80) head of dairy cows and that on an average the dairy cows upon said lands were not then and are not now of a value of more than *senvety*-five (\$75.00) Dollars per head.

l. Denies that said McKinney ever had young dairy cattle upon said lands, one hundred and fifty (150) head, or that the same were of the value of Seventy-five Hundred (\$7500.00) Dollars, but is informed and believes and therefore says that on and between the 20th of November, 1917, and April 1, 1918, there were on said lands about forty-five (45) to fifty (50) head of dry cows, yearlings and two year olds of the average value of not more than Twenty-five (\$25.00) Dollars each and forty-seven (47) head of calves of the value of not more than Ten (\$10.00) Dollars, each.

j. Denies that at the times herein mentioned said McKinney had upon said lands Ten (10) horses and Two (2) mules as alleged in Paragraph III of the complaint and denies that the value of said alleged horses and mules was Twelve Hundred (\$1200.00) Dollars, but is informed and believes and therefore says that there were but three (3) head of horses on said lands at the times herein mentioned and that the value of said three (3) head of horses was not more than Two Hundred (\$200.00) Dollars.

k. Denies that at the times herein mentioned said McKinney had upon said lands three (3) wagons and denies that said alleged wagons were

of the value of One Hundred and Seventy-five (\$175.00) Dollars, but is informed and believes and therefore says that there was and are now upon said lands some old broken down parts of wagons of no value except as junk.

1. Admits that the said McKinney had an automobile truck used in connection with the dairy business, but denies that the same was of the value of Two Hundred (\$200.00) Dollars and says that on and prior to the 20th day of November, 1917, said automobile truck was under attachment in a suit brought by the Douglas Lumber Company in the Justice Court of the Number Four Precinct of said County of Cochise, [82] in which action judgment was rendered against said McKinney on the 22d day of November, 1917, for the sum of One Hundred and One and 30/100 (\$101.30) Dollars; that said automobile was quite old and in bad repair and not worth as an old machine more than the amount of said judgment, but that the said McKinney offered to this defendant to release said automobile to him, if he the said defendant would take up said judgment; that in furtherance of said agreement said McKinney did deliver said automobile into the possession of this defendant and this defendant paid to the Douglas Lumber Company, the amount of said judgment, to wit: One Hundred and One and 30/100 (\$101.30) Dollars.

m. Admits that there is and was an old buggy on the lands above described, but denies that the same is of the value of Twenty-five (\$25.00) Dollars and says the same is in a very decrepit condition

and as old junk would not be worth Five (\$5.00) Dollars.

n. Admits that on or about the 20th day of November, 1917, that there were two (2) sets of harnesses on the premises, but says that the same were old and denies that they were of the value of Forty-five (\$45.00) Dollars and further says that the same as stated by said McKinney to this defendant were stolen while the same was under his control as manager of said dairy, that is some time subsequent to January 6, 1918.

o. Admits that there were some plows, mowing machines, filing tools and implements on the lands herein mentioned, but denies that the same were of the value of Six Hundred and Seventy-five (\$675.00) Dollars and says that the same were old, broken and in bad condition and are now upon said lands and are of no value except as junk and are not worth as junk more than Fifteen or Twenty Dollars.

p. Denies that said McKinney had upon said lands or owned and hand upon said lands between the dates of November 20th, 1917, and January 8th, 1918, Fifteen (15) head of hogs or any hogs, but that subsequently from money received from other products of the dairy, between January 8, 1918, and April 1, 1918, the said McKinney purchased some young hogs and placed the same upon said lands, but the defendant is informed and believes and therefore says that between said [83] dates or prior to April 1, 1918, the said McKinney slaugh-

tered and ate or sold all of said hogs and that on April 1, 1918, there were no hogs on said lands.

q. Admits that prior to November 2, 1917, the said McKinney conducted a Dairy Lunch Business, on 10th Street between G and F Avenue, in the City of Douglas, and that on the premises where said business was conducted there was some furniture and fixtures; that on November 2, 1917, this defendant held a mortgage on said furniture and fixtures and on said date said McKinney sold out his Dairy Lunch Business to one Charles LePine; that said sale to said LePine was for the sum of Six Hundred and Nineteen and 35/100 (\$619.35) Dollars; that said McKinney owed to the Household Furniture Store, the sum of Ninety-seven and 55/100 (\$97.55) Dollars on said furniture; that said McKinney directed the said LePine to pay to this defendant in discharge of his said mortgage, the sum of Six Hundred and Nineteen and 35/100 (\$619.35) Dollars and directed this defendant to pay to said Household Furniture Store, the sum of Ninety-seven and 55/100 (\$97.55) Dollars for same, and directed this defendant to credit the balance, to wit, the sum of Five Hundred and Twenty-one and 80/100 (\$521.80) Dollars upon his interest indebtedness to defendant and also directed the defendant to discharge the mortgage aforesaid, which the defendant held upon said fixtures and which was given by said McKinney to secure his interest indebtedness.

r. Denies that the defendant McKinney owned a lot and house as attempted to be alleged in said paragraph III of the complaint, but says that on

December 26, 1916, the said McKinney made a contract with one M. J. Donohoe for the purchase of lot nine (9) in Block Eleven (11) of the North Douglas Addition to the City of Douglas for the sum of Two Hundred and Twenty-five (\$225.00) Dollars, paying Ten (\$10.00) Dollars down and agreeing to pay Twenty-five (\$25.00) Dollars per month thereon and also agreed to forfeit his rights, if any payment was ninety (90) days in default; that some time between said December 26, 1916 and the 13th day of November, 1917, the said McKinney removed a small house from the premises described in "a" above without the consent [84] of this defendant and placed the same on said lot; that said McKinney never paid any further payment on said lot and the same became in default and the said Donohoe claimed possession of said property and on said November 13, 1917, in consideration of One (\$1.00) Dollars the said McKinney by an instrument in writing assigned said contract to this defendant, whereupon this defendant, in order to protect the value of said house upon said lot, which had been upon property mortgaged by the said McKinney to this defendant, paid to said M. J. Donohoe the sum of Two Hundred and Twenty-five (\$225.00) Dollars and obtained a deed of the same and the said property is now of record in this defendant.

Further answering, the defendant denies that all of the property alleged to be owned by said McKinney as set forth in Paragraph III of the complaint was and is of the value of Forty-eight Thousand

Four Hundred and Seventy-five (\$48,475.00) Dollars.

III.

Answering Paragrpah IV of the complaint, the defendant says that he is the owner and holder of the following described mortgages upon property at some time owned by the said McKinney.

a. Mortgage for Twenty-five Hundred (\$2500.00) Dollars on the South half of the Northwest Quarter, West half of the Northeast Quarter and all of the Southwest Quarter of Section 29 Twp. 23 S. R. 28 E. G. and S. R. B. and Meridian, also all improvements on Section 36, Twp. 22 S. R. 26 E. G. and S. R. B. and Meridian in the County of Cochise, State of Arizona, and that said mortgages with accumulated interest and taxes for several years paid by this defendant is overdue and unpaid.

b. Mortgage on the Northwest Quarter and the Northeast Quarter of the Northwest Quarter and the Southeast Quarter of the Northwest Quarter of Section 31 Twp. 23 S. R. 28 E. G. and S. R. B. and Meridian and a chattel mortgage on all dairy utensils and implements of every description including wagons and harnesses; Sixteen (16) head of horses of various brands; one (1) mule; all cattle branded E. R. L. on left side, ranging in and about Sulphur Springs Valley, Cochise County, Arizona, the utensils and implements, horses and mule on ranch of McKinney, Northeast of Douglas which said chattel mortgage is filed and abstracted in Book Five (5) of Chattel Mortgages of Cochise County, at page two hundred and [85] twenty-four (224);



that said mortgages were given to secure the sum of Thirty-five Hundred (\$3500.00) Dollars on January 8, 1915; that said mortgages, accumulated interest and taxes on said property paid by this defendant are overdue and unpaid.



c. Mortgage for Two Thousand (\$2,000.00) Dollars on the Southeast quarter of Section 24, Twp. 23 S. R. 27 E. G. and S. R. B. and Meridian and the East half of the Southwest quarter and the West half of the Southeast quarter of Section 30 Twp. 23 S. R. 28 E. G. and S. R. B. and Meridian, all in said Cochise County, Arizona; that said mortgage together with accumulated interest and taxes for several years paid by this defendant is overdue and unpaid.

d. Mortgage on all cattle and their increase, cattle branded E. R. L. on left side, ranging in the Sulphur Springs Valley, Arizona. Amount of mortgage is Forty-six Hundred (\$4600.00) Dollars, with interest at Ten (10) per cent per annum, mortgage filed and abstracted in Book Five (5) of Chattel Mortgages of Cochise County, Arizona, page one hundred and seven (107), January 21, 1914, date of mortgage January 15, 1914, that said mortgage together with accumulated interest and taxes for several years paid by this defendant is overdue and unpaid.

e. Mortgage on thirty (30) head of milch cows, fourteen (14) head of horses two (2) De Laval Separators, two (2) delivery wagons, two (2) feed wagons, all dairy utensils of every description and kind, all of the above on ranch north of

Douglas, amount of mortgage Two Thousand (\$2,000.00) Dollars, and interest at ten (10) per cent per annum, mortgage filed and abstracted in Book Five (5) of Chattel Mortgages of Cochise County, Arizona, page one hundred and sixteen (116), February 21, 1914. Date of mortgage, February 18, 1914; that said mortgage together with accumulated interest and taxes for several years paid by this defendant is over due and unpaid.

f. Mortgage on thirty-five cows branded  and  on left side, twenty-six (26)

calves branded  and  on left side, all on ranch northeast of Douglas, amount of mortgage Sixteen Hundred and sixty (\$1,660.00) Dollars, and interest at ten (10) per cent per annum, mortgage filed and abstracted in Book Five (5) of Chattel [86] Mortgages of Cochise County, Arizona, at page two hundred and five (205), November 7, 1914. Date of mortgage October 22, 1914; that said mortgage together with accumulated interest and taxes for several years paid by this defendant is overdue and unpaid.

g. Mortgage on Ford Automobile Three Hundred (\$300.00) Dollars, dated May 10, 1917, abstracted and filed in Book Six (6) of Chattel Mortgages of said Cochise County, on June 11, 1917, which mortgage was given as security for overdue interest on other mortgages and is on the automobile truck described in Section "1" of paragraph II of this answer.

h. That all just credits have been given on said mortgages and there is no credit against said mortgages that has not been applied; that all of the obligations for which said mortgages were given, bear interest at the rate of ten (10) per cent per annum, interest payable monthly; the said interest if not so paid, to be added to and to become a part of the principal, and bear the same rate of interest; that all of said mortgages except said mortgage for Three Hundred (\$300.00) Dollars provided for the payment of attorney's fees, in some cases ten (10) per cent and in others a reasonable attorney's fee.

i. Denies, as alleged in paragraph IV, that the dairy cows and the dairy cattle included within and covered by defendant's mortgages or mortgage liens have long since been sold and replaced by other dairy cows and dairy cattle and denies that but ten (10) head of dairy cows remain and are included in the dairy cows and dairy cattle set forth in the complaint, as those upon which the defendant holds mortgages.

IV.

Denies each and every allegation in paragraph V of the complaint, contained.

V.

Answering paragraph VI of the complaint, the defendant says that on or about November 3, 1917, the said Earl McKinney having disposed of his Dairy Lunch Business to said Charles LePine, informed this [87] defendant that he was without funds to provide for feed for the dairy cattle then held by him on the lands herein described, that

he had insufficient and hardly any feed to carry the cattle through the winter, that he had no credit and requested the defendant to furnish the feed and provide the funds to pay for and maintain the upkeep of said cattle; that this defendant thereupon went upon the lands herein described, inventoried the cattle thereon and discovered that all of the property provided in his said mortgages of chattels was not in the possession of the said McKinney and not deeming himself secure, took possession of said property and thereafter provided the feed and the funds for the maintenance and upkeep of the dairy conducted on said lands, the said McKinney remaining upon said lands and looking after and caring for said cattle; that on or about the middle of December, 1917, this defendant upon the admission of the said McKinney that he was unable to pay off said mortgages, directed his attorney, David Benshimol, to proceed with the foreclosure of all of his said mortgages given to him by said McKinney; that said suit to foreclose all of said mortgages was filed in the Superior Court for the County of Cochise, State of Arizona, on the 31st day of December, 1917, and a copy of the complaint was delivered to said McKinney; that thereafter the said McKinney signed a confession of Judgment for the sum of Sixteen Thousand Two Hundred and Sixty (\$16,260.00) Dollars principal, interest accrued to January 3, 1918, and attorney's fees, amounting to about Nineteen Hundred (\$1,900) Dollars; that said confession of judgment was duly filed in said Superior Court, on January

4, 1918; that immediately thereafter, the said McKinney telegraphed to the Judge of said Superior Court relative to signing of said confession of judgment, asking the Judge of said court not to enter said confession of judgment until he had seen this defendant; that thereafter, to wit: on January 7, 1918, this defendant and the said McKinney met at the office of David Benshimol in said Douglas, went over their accounts and had an accounting together and thereupon this said McKinney and this said defendant entered into an agreement for judgment upon the basis of said accounting wherein [88] they agreed that the amount for which judgment was to be entered against the said McKinney should be on the principal of said mortgages, Sixteen Thousand Two Hundred and Sixty (\$16,260.00) Dollars, and Three Thousand Six Hundred and Forty-one and 68/100 (\$3,641.68) Dollars interest, computed to January 3, 1918, and in said agreement for judgment, the amount of attorney's fees was set for the foreclosure of all of said mortgages at the sum of Five Hundred (\$500.00) Dollars and said agreement for judgment also included costs; that said agreement for judgment was duly filed in said Superior Court, on January 8, 1918.

That at said meeting for an accounting wherein said agreement for judgment was made, the said McKinney asked and requested this defendant to delay the foreclosure and sale of the property and chattels covered by said mortgages, for two or three months, to give him, the said McKinney, an opportunity to find someone who would take up the mort-

gages from this defendant and asked and requested this defendant to employ him as manager of the dairy and the cattle, which were then in this defendant's possession, until such time, within such period, as he could find someone to take up said mortgages, whereupon this defendant agreed to employ said McKinney at a salary of One Hundred and Fifty (\$150.00) Dollars per month to take charge of said dairy and care for the cattle; that from November 20, 1917, this defendant has furnished the feed and provided the care for all of the cattle on said lands and has paid the bills for the maintenance and upkeep of said dairy and has sold the products therefrom, but the proceeds from said dairy have been insufficient to pay the cost and upkeep of said cattle and said dairy; that after said accounting and said agreement said McKinney remained in the employ of this defendant until about April 1, 1918; that three weeks prior to said April 1, 1918, said McKinney left said dairy and its care and was absent for about one week, allowing the cattle and the dairy to become in a disordered condition and took and converted to his own use certain sums of money, belonging to this defendant, that he had collected from the sale of products of the dairy, well knowing that it had been [89] his agreement and custom to turn in to this defendant all collections from the sale of said products each day or at the most each second day and that he was not to make any expenditure or take any of said funds without the permission of this defendant or his attorney.

Further answering said paragraph VI, this defendant says that at no time, under the care and management of said McKinney, while in the employ of the defendant, were sales of dairy products sufficient to pay for the feed and upkeep of said stock and said dairy; that all of said milk was being sold in the City of Douglas and much of it sold direct or indirectly and consumed in the military camp outside of said City of Douglas; that said McKinney had been warned many times by health authorities of the City of Douglas and the military health authorities the milk he was delivering was not up *the* the standard and that the dairy was not being kept in a sanitary condition and the said McKinney was informed that the sale by him of milk would be forbidden if the dairy was not cleaned up, this, said McKinney refused and neglected to do although, requested by this defendant to conform to the requirements of the health authorities, several times, and the defendant to prevent further loss, on or about said April 1st, told said McKinney that he could not run said dairy any longer and immediately thereafter placed another person in charge of the dairy, but the health authorities aforesaid immediately thereafter forbade the sale of milk from said dairy until the filth and manure that had accumulated for many months upon the dairy premises, had been removed and certain sanitary changes made in the barns, tanks, machinery and milk houses on the dairy premises, and this defendant, in order that there might not be a greater loss from the suspension of said dairy expended

approximately Two Thousand (\$2,000.00) Dollars in cleaning up and remodeling said dairy premises; that for more than three weeks while these operations were going on the milch cattle and other cattle on said lands had to be fed and the milch cattle milked, which milk was disposed of at a great loss; that on or about May 5, 1918, the said health authorities permitted the sale of milk from said dairy to be resumed; [90] that subsequently, a tuberculin test was applied to said dairy cattle by the United States authorities and fourteen (14) head of milch cattle were found infected, and were ordered removed from said herd and destroyed.

Further answering said paragraph VI, the defendant says that said McKinney when directed on or about said April 1, to quit handling said dairy, agreed to do so and did do so without dissent and at the same time requested of this defendant that he advance him the sum of One Hundred (\$100.00) Dollars to make a start in some other business saying to this defendant that he was sick and tired of the dairy business and was glad it was off his hands; that said sum of One Hundred (\$100.00) Dollars was paid to said McKinney by this defendant on April 7, 1918.

Further answering said paragraph Vi this defendant denies that he entered into any fraudulent design and scheme with said McKinney as alleged in said paragraph or made with said McKinney the said agreement or any agreement other than that which is herein set forth and denies that said foreclosure proceedings were instituted in fraud

of the creditors of said McKinney and denies that said mortgage of Three Hundred (\$300.00) Dollars was fraudulent and denies that for the purpose of cheating and defrauding the creditors of said McKinney that he procured said McKinney to make and enter a confession of judgment, denies that the amount of said confession of judgment did not allow any credits which had been paid thereon by the said McKinney, but alleges that all credits had been allowed and duly credited and that the said McKinney well knew the same; denies that in furtherance of a scheme and design to cheat and defraud the creditors of said McKinney, that he did unlawfully, intentiontionally, designedly and without authority of law, forcibly oust or did oust the said McKinney from the control and possession of the property as alleged, but that said McKinney acceded to his discharge from the employment of the defendant as herein recited. [91]

VI.

Denies that said dairy cows and cattle have not been properly cared for and that the same have been neglected as alleged in paragraph VII of the complaint, or that the same have become poor and are greatly reduced in value or that he has wasted any of the improvements on the real estate, but says that the said dairy cattle and dairy cows have been carefully cared for, the health of the same improved, the diseased cattle removed and that the entire plant is in much better condition and improved than under the management of said McKinney and that the cost of the maintenance of said

plant has been materially decreased so that within the past few months the products from said dairy very nearly equal the expense of the maintenance of said dairy, and the feeding of said dairy cows and cattle; furthermore the defendant says that there has been a natural increase of said cattle from said cows during the past six or seven months.

VII.

Denies each and every other allegation, items or inference contained in the complaint and the several paragraphs thereof, not herein specifically admitted or denied.

VIII.

Further answering the complaint the defendant says that this plaintiff was appointed trustee of the bankrupt estate of said Earl N. McKinney on about the first day of May, 1918, and immediately thereafter this defendant requested this plaintiff to make an appraisal of all of the chattels in his possession, and in order that if there was, in the judgment of this plaintiff, any equity in said chattels and lands held under the mortgages given by said McKinney to the defendant, said trustee, for the benefit of said McKinney's creditors might redeem said chattels and said lands from said mortgages, the foreclosure proceedings which had been previously instituted being by this defendant still held in abeyance. But this plaintiff although often requested took no action and permitted said cattle and other chattels and lands to remain unappraised and any [92] equity, if there were any such, to be and remain undetermined. That so

far as this defendant is able to ascertain, no attempt has ever been made by this plaintiff or the duly appointed appraisers in said bankrupt estate to appraise the chattels and lands herein mentioned.

Further answering this defendant is informed and believes and therefore says that this plaintiff is guilty of *laches* in not endeavoring to ascertain the value of the lands and the value quantity and condition of the chattels that were in this defendant's possession and that the said plaintiff does not bring this action in good faith.

IX.

Further answering the complaint the defendant says that he is a dairyman and has no desire to carry on a dairy business and that he is and has always been ready and willing to discharge his said mortgages and deliver over the possession of all of the lands and chattels covered by the same when, and if he is paid the amount due and owing to him under the same and all legal charges and expenses incurred by him, and all expenses that he may be legally entitled to, provided that said payment be made without further delay and cost to him and that when this plaintiff shall offer to pay him the amounts of his claims against said property, and costs justly incurred in connection with the same he is ready and willing to make an account of all receipts and expenditures from the operation of said dairy on the lands described herein.

X.

That this defendant believes that this action is not brought in good faith and that as a result of it

he has been obliged to employ attorneys at great expense to defend the same.

WHEREFORE, the defendant prays:

1. That the Court investigate the merits of this action.

2. That the Court ascertain whether or not an accounting has been had between said McKinney and this defendant.

3. That the Court determine whether said accounting between [93] this defendant and said McKinney, if it find that there has been one made, was just and equitable and whether any fraud was perpetrated therein on said McKinney.

4. That if an accounting is found to have been had with said McKinney on or about January 7, 1918, that no accounting be directed herein.

5. That this Court make its order that this plaintiff pay to this defendant the amount of all and every amount due to this defendant under his said mortgages that is due and owing thereon and all costs and expenses and interest accrued thereon and all expense legally incurred in connection with the property and that the same be tendered or paid into Court forthwith, together with the expenses of the foreclosure proceedings referred to in this answer, before he shall be entitled to redeem said real and personal property from this defendant.

6. For his costs, expenses and attorney's fees in this action.

7. For such other and further relief as may be proper and meet in the premises.

By His Attorneys,
DAVID BENSHIMOL.
J. T. KINGSBURY.

State of Arizona,
County of Cochise,—ss.

I, David Benshimol, being duly sworn, on oath depose and say, that I am one of the attorneys for the defendant, that I have read the foregoing demurrer and answer and know the contents thereof, that I am familiar with the most of the facts alleged therein and state that the same are true as of my own knowledge, that as to those facts alleged upon belief or information and belief, I believe such to be true.

DAVID BENSHIMOL.

Subscribed and sworn to before me this 19th day of December, 1918.

[Seal]

H. W. WILLIAMS,
Notary Public.

My commission expires Feby. 19, 1920. [94]

[Indorsed on the back:]

Rec'd copy Dec. 21, 1918.

MANATT & STEPHENSON.

Filed Dec. 21, 1918. J. E. James, Clerk Superior Court. By H. P. Johnson, Deputy. [95]

In the Superior Court of Cochise County, State
of Arizona.

No. 2818.

JOHN P. CULL, Trustee,

Plaintiff,

vs.

WILLIAM COWAN,

Defendant.

NOTICE OF MOTION.

To William Cowan, Defendant, or His Attorneys
of Record, J. T. Kingsbury and David Ben-
shimol:

You will take notice that the plaintiff has filed
his motion to set aside and vacate the order and
ruling of the Court made and entered in the above
case on the 17th day of May, A. D. 1919, sustaining
defendant's demurrer to plaintiff's complaint, a
true copy of said motion is attached hereto and
made a part hereof.

That the plaintiff will ask to be heard on said
motion on the 7th day of June, 1919, at the hour
of 1:30 o'clock P. M. of said date or as soon there-
after as he can be heard, in the courtroom at the
City of Tombstone, Arizona, all at the courthouse
of said county and State.

MANNATT & STEPHENSON,

Attorneys for Plaintiff.

Copy mailed to J. T. Kingsbury, Attorney, this
22d day of May, 1919. [96]

In the Superior Court of Cochise County, State
of Arizona.

No. 2818.

JOHN P. CULL, Trustee,

Plaintiff,

vs.

WILLIAM COWAN,

Defendant.

MOTION TO SET ASIDE ORDER.

Comes now the above plaintiff and moves the Court to set aside and vacate the order and ruling of the Court made and entered in the above cause on the 17th day of May, A. D. 1919, in which order the Court sustained the demurrer of the defendant, to the plaintiff's complaint, and which order and ruling of the Court, the plaintiff *claims* is erroneous, unjust and inequitable in the premises for the following reasons:

I.

That for the reason that said matter has never been argued or set down for argument, and no notice was at any time served or given the plaintiff or his attorneys, that the same would be argued or heard on the 17th day of May, 1919, or at any other time, and the plaintiff nor his attorneys was present at said date or any other date when the same was taken up or considered by the Court, or heard by the Court and therefore the plaintiff has at no time had his day in Court on the matters involved.

II.

That the plaintiff and his attorneys reside and have their places of business in Douglas, Arizona, and some 50 miles from the county seat of Cochise County, State of Arizona, and it is impossible for litigants and their attorneys to be in continuous attendance at the place of holding Court, *whn* so located, and residing away from the county seat, and it is the practice and rule to notify litigants and their attorneys when any matters they are interested in are heard or set down for hearing, and in the matter herein involved neither the plaintiff nor his attorneys was at any time notified, of the hearing on the demurrer, or the argument thereon, and have had no *oppertunity* to present their side of the controversey and have been at all times ready and willing [97] to appear in Court at such time as the Court would set the same down for argument or hearing.

III.

That the plaintiff desires to be heard on the matter involved and raised by defendants' demurrer, and at the time *if* the ruling of the Court is adverse to the interests of the plaintiff, the plaintiff desires the *oppertunity* to make such record, and take such steps as will best protect the interests the plaintiff represents, all of which rights and interests, as the matter was disposed of in the absence of plaintiff and his attorneys is unfair and inequitable to plaintiff.

IV.

That the ruling of the Court and the order based

thereon is erroneous and not sustained by the law in the case, as plaintiff contends that his complaint states a cause of action in favor of plaintiff and against defendant.

That this motion will be sustained by oral and written evidence on the hearing thereof.

MANATT and STEPHENSON,
Attorneys for Plaintiff.

[Indorsed on the back:]

Copy mailed to J. T. Kingsbury, Attorney, May 22d, 1919.

MANATT & STEPHENSON,
Attorneys for Plaintiff.

Filed May 23, 1919. J. E. James, Clerk Superior Court. By H. P. Johnson, Deputy. [98]

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

2818.

JOHN P. CULL,

Trustee,

vs.

WILLIAM COWAN,

Deft.

COST BILL.

To Clerk filing Answer\$5.00

State of Arizona,

Cochise County,—ss.

J. T. Kingsbury, having been sworn, says that the above statement of costs in said cause is true

and correct, and that he is the attorney for defendant.

J. T. KINGSBURY.

Subscribed and sworn to before me this 10th day of Nov. 1919.

[Seal]

J. E. JAMES,

Clerk.

By H. P. Johnson,

Deputy.

[Indorsed on the back:] Filed Nov. 10, 1919.
J. E. James, Clerk Superior Court. By C. S. Bachelder, Deputy.

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

Court convened pursuant to recess at 10:00 o'clock
A. M. Present: Hon. Alfred C. Lockwood,
Judge; R. N. French, County Attorney; J. F.
McDonald, Sheriff; J. M. Phillipowski, Re-
porter; J. E. James, Clerk.

Court was duly opened by the officers, according
to law. [99]

2818.

JOHN P. CULL, etc.,

vs.

WILLIAM COWAN.

CERTIFIED COPY OF MINUTES.

Minute Entry January 18, 1919, Book 27, Page 493.

It is by the Court ordered that the hearing on

law points herein be and the same is hereby continued to January 25, 1919.

Minute Entry February 15, 1919, Book 27, Page 586.

It is by the Court ordered that the hearing on law points herein be and the same is hereby set for March 1, 1919.

Minute Entry March 1, 1919, Book 28, Page 58.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to March 8, 1919.

Minute Entry March 13, 1919, Book 28, Page 93.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to March 15, 1919.

Minute Entry March 15, 1919, Book 28, Page 99.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to March 29, 1919.

Minute Entry March 29, 1919, Book 28, Page 153.

It is by *the ordered* that the hearing on law points herein be and the same is hereby continued to April 5, 1919.

Minute Entry April 5, 1919, Book 28, Page 174.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to April 12, 1919.

Minute Entry April 12, 1919, Book 28, Page 195.

This cause came on this date for hearing on the demurrer of the defendant to the Complaint herein, the Court heard counsel on the matter and took the same under advisement.

Minute Entry May 17, 1919, Book 28, Page 300.

It is by the Court ordered that the demurrer herein be and the same is hereby sustained.

Minute Entry November 8, 1919, Book 29, Page 79.

On motion of the Plaintiff, it is by the Court ordered that [100] this action be and the same is hereby dismissed without prejudice, upon the payment of costs by the plaintiff.

ALFRED C. LOCKWOOD,
Judge of the Superior Court.

(On cover:)

State of Arizona,
County of Cochise,—ss.

I, J. E. James, Clerk of the Superior Court of the State of Arizona, in and for the County of Cochise, hereby certify the annexed and foregoing to be a full, true and correct copy of Entire Record and Minute Entries in case No. 2818, John P. Cull, etc., Plaintiff, vs. William Cowan, Defendant, the originals thereof now remaining on file in the office of said Clerk in the city of Tombstone, said state and county aforesaid.

WITNESS my hand and the Seal of the said Superior Court this 8th day of July, 1921.

[Seal]

J. E. JAMES,
Clerk of the Superior Court.

By H. P. Johnson,
Deputy.

[Endorsed on back:] Filed this 18th day of July, 1921, at 2 o'clock P. M. F. H. Bernard, Referee in Bankruptcy. [101]

Exhibit "B."

In the Superior Court in the State of Arizona, in
and for the County of Cochise.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARLE N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY, and
JAMES McDONALD, Sheriff of Cochise
County, in the State of Arizona,
Defendants.

COMPLAINT.

The plaintiff complains of the defendants and al-
leges:

I.

That heretofore, to wit, on or about the 9th day of
April, 1918, Earl N. McKinney filed in the District
Court of the United States for the District of Ari-
zona his petition in voluntary bankruptcy, and by
judgment of the District Court of the United States
aforesaid was on or about the 26th day of April,
1918, adjudged a bankrupt, and that thereafter and
in the due course of administration of the estate
of said bankrupt the plaintiff John P. Cull was by
proper order and judgment of said United States
appointed Trustee in Bankruptcy for the estate of
the said Earl N. McKinney, bankrupt as aforesaid,
and ever since has been and is now the duly ap-
pointed, qualified and acting Trustee in Bankruptcy

for said estate, and as such Trustee in Bankruptcy brings this suit for the use and to the benefit of said bankrupt estate, and the unsecured creditors thereof.

II.

That the defendant William Cowan is a resident of the County of Cochise, State of Arizona; that the defendant Earl N. McKinney at the time of becoming a bankrupt as aforesaid was a resident of the County of Cochise, State of Arizona, but is now a resident of the City of Fresno in the State of California; that the defendant James McDonald is duly elected, qualified and acting Sheriff of Cochise County, State of Arizona; that all the property both real and personal involved in this suit is situate in the County of Cochise, State of Arizona. [102]

III.

That prior to and at the time the said Earl N. McKinney became a bankrupt as aforesaid he was the owner in fee simple of the following described real and personal property situate and being in Cochise County, State of Arizona, to wit: The Northwest Quarter of Section 31, Township 23 South of Range 28 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, all of which was and is of the value of fifteen thousand (\$15,000.00) dollars, lawful money of the United States; also the South Half of the Northwest Quarter and the West Half of the Northeast Quarter of Section 29, Township 23 South of Range 28 East of the Gila and Salt River Base and Meridian, together with the improvements thereon all of which said property was and is of the value of two thou-

sand (\$2,000.00) dollars, lawful money of the United States; also Lots 1 and 2 and the South Half of the Northeast Quarter of Section 1, Township 24 South of Range 27 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, which said property was and is of the value of two thousand (\$2,000.00) dollars, lawful money of the United States; also the Southwest Quarter of Section 29, Township 23 South of Range 28 East of the Gila and Salt River Base and Meridian, together with the improvements thereon, which said property was and is of the value of two thousand (\$2,000.00) dollars, lawful money of the United States; also the West Half of the Southeast Quarter and the East Half of the Southwest Quarter of Section 30, Township 23, South of Range 28 East of the Gila & Salt River Base & Meridian, which said property was and is of the value of One Thousand Five Hundred Dollars, lawful money of the United States; also a lease from the State of Arizona for a term of five years on Section 36, Township 22, South of Range 26 east of the Gila & Salt River Base & Meridian, together with the improvements thereon, which said property was and is of the value of Five Hundred Dollars, lawful money of the United States; also household goods and furniture in the house upon the tract of land first above described which was and is of the value of [103] Two hundred Twenty-five Dollars (\$225.00), lawful money of the United States; also one hundred (100) of dairy cows in the dairy upon the lands above-described, which said cows were and are of the value of One

Hundred Twenty-five Dollars (\$125.00) each and a total value of Twelve Thousand Five Hundred (\$12,500.00), lawful money of the United States also One Hundred Fifty head (150) young dairy cattle upon the lands above described, which said cattle were and are of the value of Seven Thousand Five Hundred Dollars (\$7,500.00), lawful money of the United States; also ten (10) horses and two (2) mules used in connection with the dairy business upon the land above described, which said horses and **mules were and are of the value of One Thousand Two Hundred Dollars (\$1,200.00)**, lawful money of the United States; also three (3) wagons upon the **lands above described and used in connection** therewith, which said wagons were and are of the value of One Hundred Seventy-five Dollars (\$175.00), lawful money of the United States; also one automobile truck used in connection with the dairy business in and upon the lands above described, which said truck was and is of the value of Two Hundred Dollars (\$200.00), lawful money of the United States; also one buggy on the lands above described and used in connection with the dairy business conducted thereon, which said buggy was and is of the value of Twenty-five Dollars (\$25.00), lawful money of the United States; also two (2) sets of harness used in connection with the dairy business upon the lands above described, which said harness were and are of the value of Forty-five Dollars (\$45.00), lawful money of the United States; also plows, mowing machine, farming tools and implements used on and in con-

nection with the above-described lands, which were and are of the value of Six Hundred Seventy-five Dollars (\$675.00), lawful money of the United States; also fifteen (15) head of hogs at the dairy on the lands above described, which said hogs were and are of the value of One Hundred Fifty Dollars (\$150.00), lawful money of the United States; also what is known as Little Dairy Lunch Business, located on 10th Street between "G" and "F" Avenues, in the city of Douglas, County of Cochise, [104] State of Washington, together with all the stocks and equipments used in connection with said business, all of which was and is of the value of One Thousand Dollars, (\$1,000.00), lawful money of the United States; also lot 9 in Block 11 of the North Addition to the City of Douglas, Cochise County, Arizona, together with the house and improvements thereon, which said property was and is of the value of Seven Hundred Fifty Dollars (\$750.00), lawful money of the United States; that all the property so owned by the said Earl N. McKinney as aforesaid and above enumerated and set forth was and is of the aggregate value of Forty-eight Thousand Four Hundred Seventy-five Dollars (\$48,475.00), lawful money of the United States.

IV.

That heretofore, to wit, on or about the year 1916, and before the defendant Earl N. McKinney became a bankrupt as aforesaid, the said Earl N. McKinney made, executed and delivered to the defendant, William Cowan, a real estate mortgage for the sum of Two Thousand Five Hundred Dollars (\$2500.00),

lawful money of the United States, on the south half of the northwest quarter, and the west half of the northeast quarter, and all of the southwest quarter of Section 29, Township 23 South of Range 28 East of Gila & Salt River Base & Meridian, and also all the improvements on Section 36, Township 22 South of Range 26 East of Gila & Salt River Base & Meridian. And the said defendant Earl N. McKinney did also heretofore, to wit, on or about the month of January, 1915, make, execute and deliver to the defendant William Cowan a mortgage for the sum of Three Thousand Five Hundred Dollars (\$3,500.00), lawful money of the United States, on the northwest quarter and the northeast quarter of the northwest quarter, and the southeast quarter of the northwest quarter of section 31, township 23, South of Range 28 east of the Gila & Salt River Base & Meridian, and all of the dairy utensils and implements of every description, including wagons and harness; also sixteen (16) head of horses and one (1) mule and all the cattle branded E. R. L. on left side ranging in and about Sulphur Springs Valley, Cochise County, Arizona. And the defendant Earl N. McKinney did heretofore and on or about the year 1915 make, execute and deliver to the defendant, William [105] Cowan, a mortgage for the sum of Two Thousand Dollars (\$2,000.00), lawful money of the United States, on the southwest quarter of Section 24, Township 23 South of Range 27 East of the Gila & Salt River Base & Meridian, and the east half of the southwest quarter, and the west half of the southeast quarter of Section 30, Township 23,

south of range 28 East of the Gila & Salt River Base & Meridian; that the defendant Earl N. McKinney did heretofore, to wit, on or about the month of January, 1914, make, execute and deliver to the defendant, William Cowan, a chattel mortgage for the sum of Four Thousand Six Hundred Dollars (\$4,600.00), lawful money of the United States, on all the cattle branded E R L on the left side and their increase ranging in the Sulphur Springs Valley, Cochise County, Arizona, the defendant Earl N. McKinney did also heretofore, to wit, on about the month of February, 1914, make, execute and deliver to defendant, William Cowan, a mortgage for the sum of Two Thousand Dollars (\$2,000) on thirty (30) head of milch cows, fourteen (14) head of horses, two (2) De Laval separators, two (2) delivery wagons, two (2) feed wagons, all dairying utensils of every description and kind, all on the lands above described. And the defendant, Earl N. McKinney, did heretofore, to wit, on or about the month of October, 1914 make execute and deliver to the defendant, William Cowan, a chattel mortgage for the sum of One Thousand Six Hundred Dollars (\$1,600), on thirty-five (35) head of cows and twenty-six (26) calves, all on the lands above described. And the defendant Earl N. McKinney did heretofore, to wit, on or about the 10th day of May, 1917, make, execute and deliver to the defendant, William Cowan, a chattel mortgage for the sum of Three Hundred Dollars (\$300) on one (1) Ford Automobile, which said mortgage was abstracted and filed in Book 6 of chattel mort-

gages, Records of Cochise County, Arizona, on the 11th day of June, 1917; that said last described mortgage was bogus and fraudulent from its inception in this, to wit, that the defendant William Cowan did not give to the defendant Earl N. McKinney and the defendant Earl N. McKinney did not receive from the defendant William Cowan any consideration whatsoever for said mortgage, but that the same was made, executed, delivered and recorded as aforesaid for the express purpose [106] and with the intent of both the defendant Earl N. McKinney and the defendant William Cowan to cover up the said automobile so mortgaged from the creditors of the defendant Earl N. McKinney, and to delay, hinder and obstruct said creditors in the collection of their just debts.

V.

That the plaintiff is creditably informed, and believes and on such information and belief alleges that the defendant Earl N. McKinney caused to be paid, and did pay to the defendant William Cowan, all the interest accrued on the above mortgages from the date of their execution up to and including the 20th day of November, 1917, and that the defendant Earl N. McKinney did prior to the 20th day of November, 1917, pay and cause to be paid to the defendant William Cowan, on account of the mortgages heretofore set forth, in addition to the interest aforesaid, the sum of approximately Four Thousand Dollars (\$4,000), the exact amount of said payments and the dates thereof being to the plaintiff unknown, and that the plaintiff has made

diligent inquiry but is unable to give the exact amount of said credit, the exact information concerning the same being known only to the defendants William Cowan, and Earl N. McKinney; that there was, on or about the 20th day of November, 1917, justly due and owing to the said defendant William Cowan, from the defendant Earl N. McKinney on account of the aforesaid mortgages, approximately Fifteen Thousand Dollars (\$15,000), lawful money of the United States.

VI.

That heretofore, to wit, on or about the 20th day of November, 1917, and before the institution of the proceedings in bankruptcy, as aforesaid, by the defendant Earl N. McKinney, the defendants William Cowan and Earl N. McKinney did knowingly, designedly and intentionally, and with intent then and there to defraud the creditors of the said Earl N. McKinney, enter into a fraudulent scheme and design, each with the other, and did pursuant thereto have a verbal agreement and understanding, each with the other, that the defendant William Cowan would abandon his mortgages on the property of the defendant Earl N. McKinney, as above set forth, and that the defendant William Cowan [107] would take over all the property belonging to the defendant Earl N. McKinney as set forth and described in this complaint, and of the then value of Forty-eight Thousand Four Hundred Seventy-five Dollars (\$48,475.00), lawful money of the United States, and would cover the same up from the creditors of the said Earl N. McKinney, and that the

defendant William Cowan would place a man in charge of said property to act jointly with the defendant Earl N. McKinney in running said business, and that the defendant William Cowan collected all the rents, issues and profits of said property, and the dairy business run in connection therewith, and apply the same to the discharge of the mortgage lien that he held against the same, and that after this debt was all paid that he would return all of said property to the said Earl N. McKinney, or continue to hold the same in trust for his use and benefit if the said Earl N. McKinney so desired to further cover up said property from his creditors, and the defendant Earl N. McKinney and the defendant William Cowan did then and there also, knowingly, designedly and intentionally, and with intent then and there to defraud the creditors of the said Earl N. McKinney, enter into the further fraudulent scheme and design, each with the other, that the defendant William Cowan would institute in the Superior Court of Cochise County, State of Arizona, an action to foreclose the mortgages and liens on the property of the said defendant Earl N. McKinney, without allowing upon the record and in the judgment any credits on either interest or principal that the said defendant Earl N. McKinney had paid to the defendant William Cowan on account of said mortgages, and would also make such judgment include in its amount the sum of Three Hundred Dollars (\$300), being the amount of the bogus and fraudulent mortgage given by the defendant Earl N. McKin-

ney to the defendant William Cowan on a Ford Automobile truck, and for which the defendant Earl N. McKinney never received any consideration, as hereinbefore set forth, and that after said action should be instituted by the defendant William Cowan, that the defendant Earl N. McKinney would enter a confession of judgment thereon that pursuant to said scheme and design the defendant William Cowan did on or about the 20th day of November, 1917, and in accordance with his agreement with the defendant Earl N. McKinney so to do [108] abandon his mortgages on said property and did go upon the lands and premises belonging to the defendant Earl N. McKinney as hereinbefore specifically set forth, and did take possession of all of said property, the same being of the then value of Forty-eight Thousand Four Hundred Seventy-five Dollars (\$48,475.00) and did place a party in joint control thereof with the defendant Earl N. McKinney, and did thereafter conduct the dairy business and receive all the rents and issues and profits therefrom and convert the same to his own use and benefit, and did thereafter and in accordance with the agreement and understanding between he and the defendant Earl N. McKinney institute in the Superior Court of Cochise County, State of Arizona, an action to foreclose the aforesaid mortgages in the sum of Twenty Thousand Four Hundred Seventeen Dollars (\$20,417.00) and did fail in said action to foreclose to give the defendant Earl N. McKinney any credit for the sums that he had paid on either the principal or interest,

and that the said Earl N. McKinney in accordance with his agreement and understanding with the said William Cowan did make and send to the Superior Court of Cochise County, Arizona, through the attorney of the defendant William Cowan, in said action, his confession of judgment for said sum of \$20,417.00 and that thereafter and on or about the 1st day of April, 1918, the defendant William Cowan, in furtherance of said scheme and design to cheat and defraud the creditors of the said Earl N. McKinney, and with intent to cheat and defraud the same, did wilfully, designedly and without any authority of law forcibly oust the defendant Earl N. McKinney from the joint control and possession of all of said real and personal property, and did appropriate the same and all thereof to his own use, benefit, said property being of then value of \$48,475.00, lawful money of the United States, and ever since said date has continued in possession of and to exercise control over all of said property and to use the same as his own, and to receive the rents, issues and profits of same; that this plaintiff has no way of knowing what the rents, issues and profits of said property have been since it has been so taken over by the defendant William Cowan; that all the books, papers, accounts and records showing the same are in the possession [109] of the defendant William Cowan, who refuses to give this plaintiff access thereto; that the defendant William Cowan has not accounted to this plaintiff for said rents, issues and profits on said property and dairy busi-

ness since the same has been taken over by him as aforesaid and has allowed no credit whatsoever on account thereof on the aforesaid mortgage liens.

VII.

That heretofore, to wit, on or about the 1st day of November, 1918, the plaintiff brought a suit in the Superior Court of Cochise County, Arizona, against the defendant William Cowan for an accounting upon the whole of the matters involved herein, and that thereafter, and since said suit was at issue between the parties the defendant William Cowan in case No. 2151, in the Superior Court of Cochise County, Arizona, entitled William Cowan, Plaintiff, vs. Earl McKinney, Defendant, and being the same action brought by the said William Cowan in accordance with the aforesaid fraudulent scheme and design between the said William Cowan and the defendant Earl N. McKinney, and in which the said defendant Earl N. McKinney made a written confession of judgment as aforesaid, did on said confession of judgment obtain judgment against the defendant Earl N. McKinney for the sum of Twenty Thousand Four Hundred Seventeen Dollars (\$20,417.00) and foreclosing the mortgage liens on defendant McKinney's property, hereinbefore set forth, and did obtain, out of said court, an execution against all of the property aforesaid, and did place said execution in the hands of the sheriff of Cochise County, Arizona, and did cause the sheriff of Cochise County, Arizona, to advertise all of said property for sale at public auction on the 13th day of January, 1919, and will, unless re-

strained by order of this court, have the same sold by the sheriff of Cochise County, Arizona, on said date, to satisfy said judgment so obtained as aforesaid.

VIII.

That since the mortgages above set forth were made and executed by the defendant Earl N. McKinney to the defendant William Cowan the defendant Earl N. McKinney sold and disposed of a great deal [110] of the property set forth and described in said mortgages and brought other dairy cows and dairy cattle and placed them in said business instead of the ones so mortgaged, and the plaintiff is informed and believes and on such information and belief alleges that on the 20th day of November, 1917, when the defendant William Cowan took over said property as hereinbefore alleged that there was but ten cows and dairy cattle so taken over by the defendant William Cowan, upon which the defendant William Cowan had any mortgage, and that there was ninety (90) dairy cows and one hundred fifty head (50) of young dairy stock so taken over by the said William Cowan on which he held no mortgage and on which he had no mortgage lien. That the plaintiff has no way of identifying the cows and dairy cattle included in said mortgages and those not included therein. That the Referee in Bankruptcy for the District Court of the United States for the District of Arizona had the defendant William Cowan subpoenaed before him that he might testify of and concerning these matters, but that the defendant

William Cowan failed and refused to obey said subpoena and to so testify. That the defendant William Cowan is proceeding to sell, under said judgment, and execution, aforesaid, and the sheriff will on the 13th day of January, 1919, sell all of said cattle those not included in the mortgage as well as those included therein, unless restrained by order of this court.

IX.

That the plaintiff has no speedy, adequate or sufficient remedy at law, and unless an injunction is granted preventing the enforcement of the judgment obtained by the defendant William Cowan against the defendant Earl N. McKinney, as aforesaid, and unless the sheriff of Cochise County, Arizona, is restrained from selling the property under the execution issued aforesaid, the estate of the said Earl N. McKinney, bankrupt as aforesaid, and the unsecured creditors thereof will be irreparably injured.

X.

That there is no adequate time in which this plaintiff can give notice to the defendant of his intention to apply to the Court for a [111] restraining order; that should he wait to give this notice said property will be sold under said judgment and the injury will be complete.

WHEREFORE plaintiff prays that this court issue a temporary restraining order restraining, inhibiting and enjoining the defendant, William Cowan, from enforcing the judgment obtained by him against the defendant Earl N. McKinney, in

the Superior Court of Cochise County, Arizona, in case No. 2151, and that the defendant James McDonald, Sheriff of Cochise County, State of Arizona, be temporarily restrained, inhibited and enjoined from enforcing the execution issued on said judgment, and from selling any of the property described in this complaint thereunder; that upon final hearing that these restraining orders be made permanent; that upon final hearing hereof that this action be consolidated with the action for accounting brought by this plaintiff in the Superior Court of Cochise County, Arizona, against the defendant, William Cowan, as set forth in this complaint, and that all matters in controversy be settled and determined in said accounting, and that such judgment be entered as is just and proper in the premises and that the plaintiff have such other, further and general relief as to equity seems *mete* and proper.

MANATT & STEPHENSON,
Attorneys for Plaintiff.

State of Arizona,
County of Cochise,—ss.

John P. Cull, being first duly sworn, on his oath deposes and says: That he is the trustee in bankruptcy of the estate of the defendant Earl N. McKinney, a bankrupt, and as such is the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof, and that the facts and allegations therein contained are true of his own knowledge, except those facts therein

stated on information and belief, and as to those he believes them to be true.

JOHN P. CULL. [112]

Subscribed and sworn to before me this 6th day of January, 1919.

[Seal]

H. D. PALMER,
Notary Public.

My commission expires, June 1, 1921.

[Indorsed on the back:] Filed Jan. 8, 1919. J. E. James, Clerk Superior Court.

In the Superior Court of the State of Arizona, in
and for Cochise County.

JOHN P. CULL, Trustee,

Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY, and
JAMES F. McDONALD, Sheriff for Cochise
County, State of Arizona,

Defendants.

BOND ON RESTRAINING ORDER.

Whereas the above-named plaintiff is about to commence *and* action and has commenced his action in the above Court the Superior Court of the State of Arizona in and for Cochise County, against the above-named defendants, and has applied for a restraining order in said action against the above-named defendants William Cowan and James F. McDonald, sheriff aforesaid, enjoining and restraining them from the commission of certain acts, the

sale of certain property, under execution and notice of sale as in the complaint in said action is more particularly set forth and described, and on application to the Court and Judge thereof said restraining order is granted and issued without notice, and the bond therefor is fixed in the penal sum of One Thousand Dollars.

Now, therefore, we, the undersigned residents of the county of Cochise, State of Arizona, in consideration of the premises and the issuing of said restraining order, do jointly and severally undertake in [113] the sum of One Thousand Dollars (\$1000.00) and promise to the effect that in case said restraining order shall issue the said plaintiff will pay to said parties restrained such damages not exceeding the sum of One Thousand Dollars as such parties may sustain by reason of said restraining order if the said Superior Court should finally decide that the said plaintiff is not entitled thereto.

IN WITNESS WHEREOF we have this 7th day of January, 1919, attached our signatures hereto.

JOHN P. CULL.

J. M. HAMILTON.

J. T. HOOD.

State of Arizona,
County of Cochise,—ss.

J. M. Hamilton and J. T. Hood, the sureties in the above undertaking and bond, being each duly sworn, each for himself and not for the other says that he is worth the sum of One Thousand Dollars over and above his just debts and liabilities and over and above all property exempt by law from execu-

tion and forced sale and that he is a resident and freeholder within the county of Cochise and State of Arizona.

J. T. HOOD.

J. M. HAMILTON.

Subscribed and sworn to before me this 7 day of January, A. D. 1919.

[Seal]

J. D. PALMER,
Notary Public.

My commission expires Jan. 1st, 1921.

[Indorsed on the back:] Approved Jan. 9, 1919.
J. M. Phillipowski, Court Commissioner. Filed
Jan. 8, 1919. J. E. James, Clerk Superior Court.
[114]

In the Superior Court in the County of Cochise,
State of Arizona.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY, and
JAMES McDONALD, Sheriff of Cochise
County, in the State of Arizona,
Defendant.

Action Brought in the Superior Court of the State
of Arizona, in and for the County of Cochise
and the Complaint Filed in the said County of
Cochise, in the Office of the Clerk of said Su-
perior Court.

The State of Arizona Sends GREETING: To William Cowan, Earl N. McKinney and James McDonald, Sheriff of Cochise County, in the State of Arizona:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the Superior Court of the State of Arizona, in and for the County of Cochise, and to answer the complaint filed therein within twenty days (exclusive of the day of service) after the service on you of this summons (if served within the county otherwise within thirty days) or judgment by default will be taken against you according to the prayer of said complaint.

Given under my hand and the Seal of the Superior Court of the State of Arizona, in and for the County of Cochise, this 8th day of January in the year of our Lord one thousand nine hundred and nineteen.

[Seal]

J. E. JAMES,
Clerk.

By _____,
Deputy Clerk.

[On back:]

State of Arizona,
County of Cochise,
Office of Sheriff,—ss.

I, Porter McDonald, Constable Precinct #1 of Cochise County, State of Arizona, hereby certify that I received the within summons on the 8th day of January, 1919, and personally served the same upon [115] _____, of the defendant—

named in said summons, by delivering to and leaving with each of said defendants hereinafter named, personally, at the time and place set out opposite the name of each of the said defendant—, within the County of Cochise, State of Arizona, a copy of said summons and a true and correct copy of the complaint in the action named in said summons attached to said copy of summons.

Name.	Date served.	Where served.
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William Cowan.	Jan. 10, 1919.	Ranch.
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James McDonald, Sheriff of Cochise County in the State of Arizona, Jan. 10th, 1919, @ 4 o'clock P. M.,

by delivering to and leaving with G. R. Henshaw, Chief Deputy Sheriff under James McDonald, Sheriff of said County and State, in the office of said Sheriff, within Cochise County, State of Arizona, during office hours.

Dated this 10th day of January, 1919.

PORTER McDONALD,
Constable Precinct #1, Cochise.

By _____,
Deputy Sheriff.

[Endorsements]: No. 2861. Superior Court, County of Cochise, State of Arizona. John P. Cull, Trustee, etc., Plaintiff, vs. William Cowan, et al., Defendants. Summons. Manatt & Stephenson, Plaintiff— Attys. Filed Jan. 10, 1919. J. E. James, Clerk of the Superior Court. By H. P. Johnson, Deputy.

State of Arizona,
County of Cochise,
Justice Precinct No. 1,
Office of Constable,—ss.

I, Porter McDonald, Constable of Precinct No. One, County of Cochise, State of Arizona, hereby certify that I received the hereunto annexed temporary restraining order on the 8th day of January, 1919, and personally served the same on the 10th day of January, 1919, upon William Cowan and James McDonald, Sheriff of Cochise County, in the State of Arizona, they being two of the defendants named in temporary [116] restraining order, by delivering to and leaving with William Cowan at his ranch within the County of Cochise, State of Arizona, a true and correct certified copy of said temporary restraining order; and by delivering to and leaving with Geo. R. Henshaw, Chief Deputy Sheriff under James McDonald, Sheriff of said County and State, in the office of said Sheriff during office hours, to wit, at the hour of 4 o'clock P. M., within the County of Cochise, State of Arizona, a true and correct certified copy of said restraining order.

Dated this 10th day of January, 1919.

PORTER McDONALD,
Constable Precinct No. One, County of Cochise,
State of Arizona.

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY and
JAMES McDONALD, Sheriff of Cochise
County, in the State of Arizona,
Defendants.

TEMPORARY RESTRAINING ORDER.

On the reading and filing of the verified complaint in the above-entitled action it is hereby ordered that the defendants, and each of them, appear before the Superior Court of the State of Arizona, in and for the County of Cochise, on the 15th day of January, 1919, or as soon thereafter as said Court may hear them, to show cause, if any they have, why they, and each of them, should not be enjoined and restrained from enforcing and collecting the judgment in case No. 2151 in the Superior Court of the State of Arizona, in and for the County of Cochise, in which William Cowan is plaintiff and Earl McKinney is defendant, and from selling the property now advertised for sale on the 13th day of January, 1919, by the Sheriff of Cochise County, [117] Arizona, under an execution in his hands issued out of the Clerk's office of the Superior Court of Cochise County, State of Arizona, in the above-entitled action, and why the prayer of said

complaint should not be granted. And pending the hearing, you and each of you said defendants are hereby restrained, inhibited and enjoined from collecting or in any way enforcing said judgment, or selling or attempting to sell any property on execution thereunder until the further order of this Court.

That this order is granted by the undersigned Judge of the Superior Court of the State of Arizona, in and for the County of Pima, at chambers, at the courthouse in the county of Pima, State of Arizona, upon the showing first having been made that the Hon. Alfred C. Lockwood, Judge of the Superior Court of the county of Cochise, State of Arizona, is now absent from said County of Cochise, and could not be procured to grant this writ in time to save the plaintiff irreparable injury.

That a bond is fixed herein at the sum of One Thousand Dollars, and this order shall be in full force and effect when said bond is given by the plaintiff herein and approved by the Clerk of the Superior Court of Cochise County, Arizona, and not until then.

And it is further ordered that a copy of the complaint in this suit, together with this order be served upon the defendants.

Dated this 7th day of January, 1919, at 2 P. M.

G. W. SHUTE,

Judge of the Superior Court of Gila County, Arizona, Acting for Judge Pattee of Pima Co., Because of Illness and Disqualification of Judge Pattee.

[Indorsed on the back:] Filed Jan. 10, 1919.
J. E. James, Clerk of the Superior Court. By H.
P. Johnson, Deputy. [118]

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY, and
JAMES McDONAIL, Sheriff of Cochise
County, in the State of Arizona,
Defendants.

MOTION.

Now come the defendants in the above-outlined
cause and move this Court dissolve the restraining
order issued in said cause by G. W. Shure, Judge
of the Superior Court of Pima County, on the 7th
day of January, 1919.

DAVID BENSHIMOL,
J. T. KINGSBURY,
Attorneys for the Defendants.

[Indorsed on the back:] Filed Jan. 15, 1919.
J. E. James, Clerk Superior Court. By H. P.
Johnson, Deputy. [119]

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

JOHN P. CULL, Trustee in Bankruptcy of the Es-
tate of EARL N. McKINNEY, a Bankrupt,
Plaintiff,

vs.

WILLIAM COWAN, EARL N. McKINNEY and
JAMES McDONALD, Sheriff of Cochise
County, in the State of Arizona,
Defendants.

DEMURRER OF THE DEFENDANT WILL-
IAM COWAN.

Comes now the defendant William Cowan in the
above-entitled action—

I.

Demurs to the complaint because the facts therein
alleged do not constitute a cause of action.

II.

This defendant especially demurs to the complaint
for the reason that it appears by the allegations
thereof and references to the complaint brought by
this same plaintiff in the action No. 2818 in said
Superior Court that this action is inconsistent with
said action No. 2818; that if the purpose of the
present action is to enjoin the sale of the mort-
gaged property for the reasons alleged, the alleged
claim or inference of the conversion of said prop-
erty by this defendant in said action No. 2818
would give this plaintiff no right or interest in said

property except as to the value of the property alleged to have been converted.

III.

The defendant further especially demurs to the complaint on the ground that this Court has no jurisdiction of the subject of this action in that the allegations of the complaint admit that in action No. 2851 in this court this defendant has obtained judgment and a valid legal execution was issued thereon that no appeal has ever been taken from the judgment therein and no stay of execution or suspension of the execution made or issued.

DAVID BENSHIMOL,
J. T. KINGSBURY,

Attorneys for the Defendants. [120]

State of Arizona,
County of Cochise,—ss.

David Benshimol, being duly sworn, on oath depose—and say—that he is one of the attorneys for the defendants; that he is familiar with the facts set forth in the complaint, that he has read the foregoing *answer* and knows the conditions thereof and that the allegations therein contained are true of his own knowledge except facts therein stated on information and belief and as to these he believes them to be true.

DAVID BENSHIMOL.

Subscribed and sworn to before me this 14th day of January, 1919.

[Seal]

H. W. WILLIAMS,
Notary Public.

My commission expires Feby. 19, 1920.

[Indorsed on the back:]

Copy of within received this 14th day of January, 1919.

Attorneys for Plaintiff.

Filed Jan. 15, 1919. J. E. James, Clerk Superior Court. By H. P. Johnson, Deputy.

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

No. 2861.

JOHN P. CULL, Trustee,

vs.

WILLIAM COWAN, Deft.

COST BILL.

To Clerk of Court, filing answer \$5.00
State of Arizona,
Cochise County,—ss.

J. T. Kingsbury, having been first sworn, says that the above statement of costs of defendant is true and correct, and that he is the [121] attorney for defendant.

J. T. KINGSBURY.

Subscribed and sworn to before me this 10th day of Nov., 1919.

[Seal]

J. E. JAMES,
Clerk.

By H. P. Johnson,
Deputy.

[Indorsed on the back:] Filed Nov. 10, 1919.
J. E. James, Clerk Superior Court. By C. S. Bach-
elder, Deputy.

In the Superior Court of the State of Arizona, in
and for the County of Cochise.

Court convened pursuant to recess at 10:00 o'clock
A. M. Present: Hon. Alfred C. Lockwood,
Judge; R. N. French, County Attorney; J. F.
McDonald, Sheriff; J. M. Phillipowski, Re-
porter; J. E. James, Clerk.

Court was duly opened by the officers, according
to law.

2861'

JOHN P. CULL, etc.,

vs.

WILLIAM COWAN et al.

CERTIFIED COPY OF MINUTES.

Minute Entry of January 11, 1919, Book 27, Page
462..

It is by the Court ordered that the hearing on law
petition for injunction herein be and the same is
hereby continued to January 18, 1919.

Minute Entry January 18, 1919, Book 27 Page 493.

It is by the Court ordered that the hearing on law
points herein be and the same is hereby continued
to January 25, 1919.

Minute Entry January 25, 1919, Book 27, Page 498.

Counsel argued and submitted the motion of the
defendants to dissolve the temporary restraining

order heretofore granted herein and the Court granted the same. Counsel for the plaintiff gave oral notice of appeal to the Supreme Court of the State of Arizona, from [122] the order granting said motion and from the whole thereof. On motion of counsel for the plaintiff the Court fixed a supersedeas bond in the sum of \$43,000.00.

Minute Entry of February 15, 1919, Book 27, page 586.

It is by the Court ordered that March 1st, 1919, be and the same is hereby set as the date for hearing on law points herein.

Minute Entry March 1st, 1919, Book 28, page 58.

It is by the Court ordered that the hearing on law points herein be, and the same is hereby continued to March 8th, 1919.

Minute Entry March 13th, 1919, Book 28, page 93.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to March 15, 1919.

Minute Entry March 15, 1919, Book 28, page 98.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to March 29, 1919.

Minute Entry March 29, 1919, Book 28, Page 153.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to April 5, 1919.

Minute Entry April 5, 1919, Book 28, Page 174.

It is by the Court ordered that the hearing on law points herein be and the same is hereby continued to April 12, 1919.

Minute Entry April 12, 1919, Book 28, Page 194.

This cause came on this date for hearing on the Demurrer of the defendant to the complaint herein, the Court heard counsel on the demurrer and took same under advisement.

Minute Entry of November 18, 1919, Book 29, Page
79.

On motion of the plaintiff it is by the Court ordered that [123] this action be, and the same is hereby dismissed without prejudice, upon the payment of the costs by the plaintiff.

ALFRED C. LOCKWOOD,
Judge of the Superior Court.
(On Cover:)

State of Arizona,
County of Cochise,—ss.

I, J. E. James, Clerk of the Superior Court of the State of Arizona, in and for the County of Cochise, hereby certify the annexed and foregoing to be a full, true and correct copy of entire record and minutes in case No. 2861, John P. Cull, etc., Plaintiff, vs. William Cowan, et al., Defendant, the originals thereof now remaining on file in the office of said Clerk in the City of Tombstone, said state and county aforesaid.

Witness my hand and the Seal of said Superior Court this 8th day of July, 1921.

[Seal]

J. E. JAMES,
Clerk of the Superior Court.

By H. P. Johnson,
Deputy.

[Endorsed on back:] Filed this 18th day of July, 1921, at 2 o'clock P. M. F. H. Bernard, Referee in Bankruptcy.

(Endorsement of the Clerk of the United States District Court for the District of Arizona: The following papers filed under one cover: Petition for Review, Exhibit "A," Exhibit "B." Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy.) [124]

In the District Court of the United States, for the
District of Arizona.

No. B—31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

Certificate of Review.

To the Hon. WILLIAM H. SAWTELLE, District
Judge:

I, F. H. Bernard, the Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding certain findings of fact and conclusions of law, a copy whereof is handed up herewith, were made and entered by me on the 16th day of May, 1921.

That on the 18th day of July, 1921, William Cowan, feeling aggrieved thereat, filed a petition for a review which was granted.

That a summary of the evidence is handed up herewith that the question presented on this review is whether on the record in this case William Cowan,

the respondent to a petition filed herein by the Trustee, and who has appeared especially to interpose a preliminary objection to the jurisdiction of this Referee, is an adverse claimant to the funds resulting from the sale of certain property formerly belonging to the Bankrupt and the proceeds of which sale were claimed by the Trustee as part of the Bankrupt's estate.

I hand up herewith for the information of the Judge the following papers:

1. A record of this proceeding.
2. The petition on which this certificate is granted.
3. All papers filed with me herein which are pertinent to this review.

Dated at Tucson, Arizona, this 19th day of July, 1921.

Respectfully submitted,
F. H. BERNARD,
Referee in Bankruptcy.

[Endorsement on back:] Certificate of Review.
Filed Jul. 19, 1921. C. R. McFall, Clerk. By Lella Spence, Deputy. [125]

In the United States District Court for the District
of Arizona.

B—31—TUCSON.

In the Matter of EARL N. McKINNEY, Bankrupt.

Notice for Hearing Petition for Review.

To the Referee in Bankruptcy and to Messrs.
Manatt & Stephenson:

YOU, AND EACH OF YOU, TAKE NOTICE:
That on Friday, September 16, 1921, at the hour
of 10:00 o'clock A. M. or as soon thereafter as
counsel can be heard, I will call up for hearing the
determination of the petition of William Cowan for
Review of the Referee's Findings of Fact and Con-
clusions of Law heretofore filed herein.

DAVID BENSHIMOL,
Attorney for William Cowan.

Copy hereof received this 8 day of September,
1921.

MANATT & STEPHENSON,
Attorneys for Trustee.

Copy hereof received this 9th day of September,
1921.

F. H. BERNARD,
Referee in Bankruptcy.

[Endorsement on back:] Filed Sep. 10, 1921.
C. R. McFall, Clerk. [126]

May, 1921, Term—Monday, October 17th, 1921—
Tucson.

In the District Court of the United States, for the
District of Arizona.

Honorable WILLIAM H. SAWTELLE, United
States District Judge, Presiding.

MINUTE ENTRY.

B—31.

In the Matter of EARL N. McKINNEY, Bankrupt.

**Minutes of Court—October 17, 1921—Order Fixing
Date of Hearing.**

The petition of William Cowan, for review of Referee's findings herein, comes on regularly for hearing this day. No solicitor appears for the interested parties in this matter.

It is ordered that said petition be set down for hearing before this Court November 1st, 1921, at 10: A. M. [127]

In the District Court of the United States in and
for the State of Arizona.

No. B—31—TUCSON.

In the Matter of EARL McKINNEY, Bankrupt.

Motion to Strike Petition for Review and Dismissal of Same.

Comes now the trustee J. P. Cull by his attorney and moves the Court to dismiss the proceedings

of William Cowan, and his said petition for review and strike same from the files for the following reasons to wit:

I.

That as is shown by the files and records of this matter and the files herein, said William Cowan, from his own fault and negligence, allowed sixty days to *elaps*, after the filing and service of the findings of fact and conclusions of law, made and entered by the Referee, before filing or serving his said pretended petition for review, which said petition for review was at no time served on said Trustee or his attorney, and the time allowed to elapse by said Cowan is contrary to the rules of this Court and contrary to the rules of practice in such cases under the established rules of law.

II.

That the findings of fact and conclusions of law of the Referee were arrived at after full and complete hearing and trial at which times and places the said Cowan and his attorney were present and participated therein, and the results arrived at by the referee, is a decision and judgement, and not an order as is contemplated under Sec. 39 of Bankrupt Act, and Supreme Court Order No. 27, and subject to review by proper petition, and this pretended petition for review, gives this Court no jurisdiction to review the Referee's findings herein.
[128]

III.

That the said pretended petition for review is insufficient in substance and in form, and failes to

specifically point out any error in the rulings or order made by the Referee, and duly excepted to, and is a mere argument as to what "appears" to have been done by the Referee, and the same is wholly insufficient to inform the Court as to the specific errors complained of.

C. V. MANATT,

Attorney for Trustee.

[Endorsement on back:] Filed Oct. 26, 1921.
C. R. McFall, Clerk. By Preston Turner, Deputy.
[129]

In the District Court of the United States in and
for the State of Arizona.

No. 31—B (TUCSON).

In the Matter of EARL McKINNEY, Bankrupt.

Affidavit of Service.

State of Arizona,
County of Cochise,—ss.

C. V. Manatt, of lawful age, being first duly sworn on his oath deposes and says that he is the attorney of record and by appointment of the Trustee John P. Cull in the above and foregoing matter, and that he served his motion to strike and dismiss the petition for review of William Cowan on the attorney of record for said Cowan, David Benshimol, in the City of Douglas, Arizona, on the 27th day of October, 1921, by mailing to said Benshimol at his known address a true and correct copy of the same,

all postage thereon when deposited in the postoffice at Douglas, Arizona, being fully prepaid thereon.

C. V. MANATT.

Subscribed and sworn to before me this 27th day of October, 1921.

[Seal]

GEO. M. ROARK,
Notary Public.

My commission expires 2/11/22.

[Endorsement on back:] Affidavit of Service of Copy on David Benshimol. Filed Oct. 21, 1921. C. R. McFall, Clerk. By Preston Turner, Deputy.
[130]

May, 1921, Term—Tuesday, November 1st, 1921—
Tucson.

In the District Court of the United States, for the
District of Arizona.

Honorable WILLIAM H. SAWTELLE, United
States District Judge, Presiding.

MINUTE ENTRY.

B—31.

In the Matter of EARL McKINNEY, Bankrupt.

**Minutes of Court—November 1, 1921—Order Over-
ruling Motion to Dismiss.**

The petition of William Cowan for review of the Referee's findings of fact herein, together with trustee's motion to dismiss said petition, come on regularly for hearing this day. David Benshimol, Esq., appearing as the solicitor for the petitioner,

William Cowan, and F. H. Bernard, Esq., Referee herein, appearing in person. The matters above referred to are considered by the Court.

Whereupon the Court does order that the motion to dismiss on the ground that the petition for review was not filed in time is overruled.

The petition for review is taken under advisement by the Court and the petitioner granted ten days within which to file his memorandum of points and authorities in support of the same. [131]

May, 1922, Term—Tuesday, September 5, 1922.—
Tucson.

In the District Court of the United States for the
District of Arizona.

Honorable WILLIAM H. SAWTELLE, United
States District Judge, Presiding.

MINUTE ENTRY.

B—31.

In the Matter of EARL N. McKINNEY, Bankrupt.

Minutes of Court—September 5, 1922—Order Affirming Referee's Findings of Fact and Conclusions of Law.

The petition of William Cowan, filed herein July 19, 1921, having been heretofore submitted to the Court, and by the Court taken under advisement, and the Court, having fully considered the same, does now order that the petitioner's motion to dismiss for want of jurisdiction in the Referee or this

Court be, and the same is, hereby overruled, the Court being of the opinion that the Referee was within his rights and proceeded lawfully in instituting summary proceedings referred to in the *the* said petition, and that it was not necessary that the matters and things referred to in said petition be determined in a plenary action;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the findings of fact and conclusions of law made by the Referee be, and the same are, hereby affirmed.

IT IS FURTHER ORDERED that the Clerk send papers and records in this case back to the Referee for further proceedings in accordance with this decision. [132]

In the District Court of the United States for the District of Arizona.

No. B-31—TUCSON.

In the Matter of EARL McKINNEY, Bankrupt.

**Petition for Appeal to Circuit Court of Appeals
and Order Allowing Same.**

Comes now William Cowan, petitioner in the above-entitled matter, and conceiving himself aggrieved by that certain order, judgment, or decree made and entered in the above entitled matter on the 5th day of September, 1922, does hereby appeal from said order, judgment, or decree to the United States Circuit Court of Appeals for the Ninth Cir-

cuit, for the reasons specified in the assignment of errors which is filed herewith.

And said William Cowan, petitioner, prays that he be allowed this appeal, and that the transcript of record, papers and proceedings upon which said order, judgment, or decree was made duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

DAVID BENSHIMOL,
Attorney for Petitioner.

ORDER.

The above petition for appeal to the United States Circuit Court for the Ninth Circuit is hereby allowed.

Sept. 28, 1922.

WM. H. SAWTELLE,
Judge.

[Endorsements on back:]

Receipt of a copy of the enclosed petition for appeal is hereby acknowledged this 14th day of Sept. 1922.

C. V. MANATT,
Atty. for Trustee.

Filed Sep. 15, 1922. C. R. Fall, Clerk. United States District Court for the District of Arizona.
By Paul Dickason, Deputy Clerk. [133]

In the District Court of the United States for the
District of Arizona.

No. B-31—TUCSON.

In the Matter of EARL McKINNEY, Bankrupt.

Assignment of Errors.

Comes now William Cowan, petitioner in the above-entitled matter, and makes and files the following assignment of errors upon which he will rely upon the prosecution of his appeal from that certain order, judgment, or decree made by this Honorable Court, and entered in the above-entitled matter on the 5th day of September, 1922:

First. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the referee had no jurisdiction in the matter involved, and the said William Cowan specifically objected to, and declared his intention to object to the taking of jurisdiction in said matter by the referee, and has never consented thereto.

Second. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the subject matter involved in the proceedings is not, and was not within the jurisdiction of the referee.

Third. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the said William Cowan has not submitted himself, and does not now submit himself to the jurisdiction of the referee, or this Court, except so far as submission, specially, may

be necessary for this Court to determine whether it had jurisdiction herein.

Fourth. The Court erred in affirming the findings of fact (1) and conclusions of law made by the referee for the reason that the said referee and this Court have no jurisdiction herein, these proceedings being summary proceedings. [134]

Fifth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that this Court has no jurisdiction in this matter because William Cowan is and was in possession of all the matters and things herein involved as an adverse claimant.

Sixth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the said referee's overruling of objection to jurisdiction made by said William Cowan, was, for the matters herein recited, without legal effect.

Seventh. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that no foundation is laid in said findings of fact and conclusions of law for any summary proceedings herein.

Eighth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the referee had, and has no right to adjudicate upon the matters and things involved herein; that the only person entitled to bring a suit or determine what is to be accounted for, is the trustee; that in such suit said William Cowan would, if he so desired, be entitled to a jury trial.

Ninth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the matters and things involved in said findings of fact and conclusions of law are not based upon any petition for relief, or request to the referee for relief on the part of William Cowan.

Tenth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that (2) there does not appear to have been any application on file in the matter of this estate on the part of the trustee invoking action by the referee.

Eleventh. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the matters and things involved in the findings of fact and conclusions [135] of law are not based upon any hearing on December 22d, 1919 in which said William Cowan appeared as a party; but it appears that on said date said William Cowan was summoned as a witness to testify as to his transaction with bankrupt.

Twelfth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the trustee, John P. Cull, Esq., has twice begun litigation in the Superior Court of the County of Cochise, State of Arizona, upon the matters and things which are the subject of said findings of fact and conclusions of law, to wit, an action for an accounting entitled "John P. Cull, Trustee, vs. William Cowan," numbered 2818, which action was begun on the 30th day of November,

1918, a certified copy of which is included in the record herein; and an action to enjoin the sale under foreclosures of the properties involved under the mortgages mentioned in said findings of fact and conclusions of law, which action was brought in said Superior Court on or about the 8th day of January, 1919, and is numbered 2861 and entitled "John P. Cull, Trustee, vs. William Cowan and James McDonald, Sheriff of Cochise County," a copy of which is included in the record herein.

Thirteenth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that certain of the findings of fact are based upon deductions of the referee and not upon any evidence, to wit: that there were earnings from the cattle or benefits from the property, (3) when in truth and in fact the holding in possession by said William Cowan pending the delays by the trustee in determining whether he wished to redeem the property from the mortgages to said William Cowan, for the benefit of the estate; and the litigation started by said trustee and carried to the point of the limit of time to complete appeal to the Supreme Court of the State of Arizona, which litigation was then, to wit: on November 8th, 1919, dismissed; caused expense in excess of the interest accruing upon the mortgages held by said Cowan, and any increases in the number of cattle held; that although said William Cowan [136] bid the amount of his said mortgages and interest, at the foreclosure sale, the trustee did not at any time offer to pay said bankrupt's indebted-

ness to said William Cowan, or offer to bid at said sale, and there is no evidence showing that the property sold at foreclosure sale was of the value that said William Cowan bid thereon.

Fourteenth. The Court erred in affirming the findings of fact and conclusions made by the referee for the reason that the said findings of fact and conclusions of law are not based upon any evidence upon which to determine that the sum of One Thousand Two Hundred Sixty-five and 58/100 (\$1,265.58) Dollars was unaccounted for, for two reasons: (1) that the bankrupt had other dealings with said William Cowan than those involved in the mortgages foreclosed; and (2) that all accounts and matters involving all transactions between said bankrupt and said William Cowan were adjusted and settled in the agreement for judgment signed by the bankrupt on January 8th, 1918; that by the terms of the mortgages and notes, upon which said William Cowan was then foreclosing, the said bankrupt was obligated to pay as attorney's fees thereon, in case suit was brought, the sum of One Thousand Nine Hundred Seventy-four and 59/100 (\$1,974.59) Dollars; that said accounting was completed as to all matters (4) between the bankrupt and said William Cowan and said bankrupt owed said William Cowan the said sum of One Thousand Nine Hundred Seventy-four and 59/100 (\$1,974.59) Dollars, as well as the principal and interest of said mortgages.

Fifteenth. The Court erred in affirming the findings of fact and conclusions of law made by the

referee for the reason that there has been no fraud and there is no fraud alleged on the part of William Cowan, which would have been ground for these proceedings.

Sixteenth. The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason [137] that the property involved in the bankrupt's estate, mortgaged to William Cowan, was at the time of the adjudication, and for a long time after, subject to redemption by the trustee; and that the trustee took no steps to redeem said property, and is guilty of laches.

In order that the foregoing assignment of errors may be and appear of record, the petitioner presents the same to the Court, and prays that such disposition be made thereof as in accordance with law and statutes of the United States in such case made and provided, and petitioner prays a reversal of said order, judgment, or decree appealed from, and each and every part thereof, entered by the United States District Court for the District of Arizona, and revision of said order, judgment, or decree appealed from, and each and every part thereof.

DAVID BENSHIMOL,

Attorney for Petitioner.

[Endorsements on back:]

Receipt of a copy of the within assignment of errors is hereby acknowledged this 14th day of September, 1922.

C. V. MANATT,

Attorney for Trustee.

Filed Sept. 15, 1922. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Paul Dickason, Deputy Clerk. [138]

Stipulation in re Appeal Bond.

DAVID BENSHIMOL,
Attorney and Counselor at Law,
Room 2 Brophy Building,
Douglas, Arizona.

October 4th, 1922.

Hon. Wm. H. Sawtelle,
Judge United States District Court,
Tucson, Ariz.

Dear Sir:

Re: B-31 (TUCSON.)

EARL N. McKINNEY, Bankrupt.

IT IS HEREBY STIPULATED AND AGREED between David Benshimol, attorney for William Cowan, appellant, and C. V. Manatt, representing the Trustee, that the Appeal Bond be made in the sum of Ten Thousand (\$10,000.00) Dollars.

Very truly yours,

DAVID BENSHIMOL,
C. V. MANATT,

Atty. for Trustee.

[Endorsement on back:] Filed Oct. 9, 1922. United States District Court for the District of Arizona. C. R. McFall, Clerk. By Paul Dickason, Deputy Clerk. [139]

In the District Court of the United States for the
District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL McKINNEY, Bankrupt.

Order Allowing Supersedeas.

The appellant, William Cowan, having heretofore filed his petition for an appeal from a final decree rendered herein on the 5th day of September, 1922, filed in the office of the clerk of the United States District Court on the same date, and overruling this appellant's motion to dismiss for want of jurisdiction, and affirming the findings of fact and conclusions of law made by the Referee herein, and remanding the matter to the Referee for further proceedings, and having filed an assignment of errors, and said appeal having been heretofore allowed to the petitioner, aforesaid—

IT IS ORDERED, that the said appeal shall operate as a supersedeas of the said order, judgment and decree entered herein on the 5th day of September, 1922, and shall stay the execution of said decree pending such appeal upon execution of a bond in the penalty of the sum of Ten Thousand (\$10,000.00) Dollars.

Dated October 16, 1922.

WM. H. SAWTELLE,
U. S. District Judge.

[Endorsement on back:] Filed Oct. 16, 1922.
United States District Court for the District of
Arizona. C. R. McFall, Clerk. By Paul Dickason,
Deputy Clerk. [140]

In the District Court of the United States for the
District of Arizona.

In the Matter of EARL N. McKINNEY, Bankrupt.

Appeal and Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, William Cowan, the petitioner in the
above-entitled matter, as principal, and A. G. Ste-
venson, of Bisbee, in Cochise County, Arizona, and
W. J. Davis, of McNeal, in said county and State,
are held and firmly bound unto John P. Cull, Trus-
tee in Bankruptcy, in the above-entitled matter, in
the sum of Ten Thousand (\$10,000.00) Dollars, law-
ful money of the United States of America, for the
payment of which well and truly to be made, we
bind ourselves, all and each of our heirs, successors,
and legal representatives, jointly and severally,
firmly by these presents.

Signed with out hands, and sealed with out seals,
this *12th* day of October, 1922.

The condition of the above undertaking is such
that:

WHEREAS, William Cowan, the principal
herein, is desirous of appealing to the United States
Circuit Court of Appeals for the Ninth Circuit,
from that certain decision, order, judgment, and de-
cree rendered and entered against him in the above-
entitled United States District Court, for the Dis-
trict of Arizona on the 5th day of September, 1922,
to wit, the order overruling the petition of said
William Cowan to review certain proceedings at-

tempted to be brought against him, for want of jurisdiction in the Referee in said cause, to wit, also, the order decreeing that the findings of fact and conclusions of law made by the Referee in said proceedings against said Cowan be affirmed, to wit, also the order directing the papers and records to be sent back to the Referee for further proceedings in accordance with said decision; and

WHEREAS, William Cowan, the petitioner herein, is desirous of staying all further proceedings against him by or before the [141] said District Court and by or before the said Referee, in the above-entitled matter,

NOW, THEREFORE, if the above-named principal, William Cowan, shall prosecute his said appeal with effect, and in case the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, shall be against him, perform its judgment, or decree, and pay all such damages and costs as may be awarded against him on appeal, then this obligation to be null and void; otherwise to be and remain in full force and effect.

WILLIAM COWAN,
Principal.

A. G. STEVENSON,
Surety.

W. J. DAVIS,
Surety.

State of Arizona,
County of Cochise,—ss.

A. G. Stevenson and W. J. Davis, being duly sworn, each for himself, says: That he is one of the

sureties named in the above bond; that he is a resident freeholder within the State of Arizona, and is worth the sum of Ten Thousand (\$10,000) Dollars over and above his just debts and liabilities, exclusive of property exempt from execution.

A. G. STEVENSON.

W. J. DAVIS.

Subscribed and sworn to before me this 12th day of October, 1922.

[Seal]

DAVID BENSHIMOL,

Notary Public.

My commission expires Feb. 17, 1924.

Approved Oct. 16, 1922.

WM. H. SAWTELLE,

Judge.

[Endorsement on back:] Filed Oct. 16, 1922.
United States District Court for the District of Arizona. C. R. McFall, Clerk. By Paul Dickason, Deputy Clerk. [142]

In the District Court of the United States for the
District of Arizona.

No. B-31—(TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt,

Designation of Record.

To John P. Cull, Trustee, and C. V. Manatt, His
Attorney:

You and each of you will please take notice that the errors of the District Court for the District of

Arizona upon which the undersigned petitioner, William Cowan, intends to rely in his petition for revision, and on his appeal from the order of the District Court of the United States for the District of Arizona dated September 5th, 1922, which petition and appeal have heretofore been filed, and a copy thereof served upon you, are the errors of overruling the motion to dismiss for want of jurisdiction, and of affirming those certain findings of fact and conclusions of law made herein by the Referee on the 16th day of May, 1921, as more particularly set forth in the assignment of errors heretofore filed in this matter. As necessary for the consideration thereof, the petitioner aforesaid designates the following record to be printed:

1. The petition in bankruptcy filed April 9th, 1918.
2. Schedules A-2, B-1, and B-2; and the summary of assets and liabilities, filed with and attached to the above petition.
3. Adjudication of bankruptcy, and order of reference dated April 9th, 1918.
4. Order appointing trustee, and bond of trustee, and order approving same, dated April 30th, 1918.
5. Order appointing appraisers, dated April 25th, 1918.
6. Report of Trustee, dated July 31st, 1918, filed August 3d, 1918.
7. Supplemental report of Trustee, dated Oct. 2d, 1918. [143]
8. Statement of Evidence of bankrupt, taken Oct. 21st, 1918.

9. Special report of Trustee, dated Nov. 22d, 1918.
10. Order for trustee to bring suit, dated Nov. 25th, 1918.
11. Report of trustee dated December 4th, 1919.
12. Order citing William Cowan to appear before Referee, dated December 5th, 1919.
13. Referee's findings and order to show cause, filed February 16th, 1920.
14. Special appearance of William Cowan, and objections to Referee's order to show cause, filed March 8th, 1920.
15. Order overruling petition of trustee, dated May 8th, 1920.
16. Certificate by Referee to Judge, dated May 17th, 1920, with testimony of William Cowan as attached thereto.
17. Order for return of files to Referee with instructions, dated June 26th, 1920.
18. Record of proceedings had before the Referee from April 12th, 1918, to July 19th, 1921, as filed July 19th, 1921.
19. Referee's findings of fact and conclusions of law, dated May 16th, 1921, and filed July 19th, 1921.
20. Certificate of review, and petition of William Cowan for review, filed July 19th, 1921.
21. Notice of hearing filed September 10th, 1921.
22. Order setting petition of William Cowan for hearing, dated October 17th, 1921.
23. Trustee's motion to strike, dated October 26th, 1921.
24. Affidavit of service, dated October 31st, 1921.

25. Order overruling Trustee's motion, dated November 1st, 1921.
26. Order of Court, dated September 5th, 1922, denying petition of William Cowan, and affirming Referee's findings, dated May 16th, 1921.
27. Petition of William Cowan for Appeal to United States Circuit Court of Appeals, filed September 15th, 1922, and order allowing same. [144]
28. Assignment of errors filed September 15th, 1922.
29. Citation on appeal, issued Oct. 16, 1922.
30. Appeal and supersedeas bond, filed Oct. 16, 1922.
31. This praecipe, designating record, filed Oct. 12, 1922.

DAVID BENSHIMOL,

Attorney for Petitioner.

[Endorsements on back:]

Receipt of a copy of the enclosed designation of record is hereby acknowledged this 30th day of September 19, 1922.

C. V. MANATT,

Atty. for Defendant in Error.

Filed Oct. 12, 1922. United States District Court for the District of Arizona. C. R. McFall, Clerk.

In the United States District Court for the District
of Arizona.

(B-31.)

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

**Order Enlarging Time to and Including December
15, 1922, to File Record and Docket Cause.**

Good cause appearing therefor—

IT IS ORDERED that the time within which the appellant may file the record on appeal herein and docket this cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby enlarged and extended to and including the 15th day of December, 1922.

Dated at Tucson, Arizona, this 9th day of November, 1922.

WM. H. SAWTELLE,

Judge. [146]

[Endorsed]: B-31—Tucson. Filed Nov. 9, 1922.
United States District Court for the District of
Arizona. C. R. McFall, Clerk. By Paul Dickason,
Deputy Clerk. [147]

In the United States District Court for the District
of Arizona.

B-31.

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

**Order Enlarging Time to and Including December
26, 1922, to File Record and Docket Cause.**

Good cause appearing therefor—

IT IS ORDERED that the time within which the
appellant may file the record on appeal herein and
docket this cause with the Clerk of the United States
Circuit Court of Appeals for the Ninth Circuit be,
and the same is hereby enlarged and extended to and
including the 26th day of December, 1922.

Dated at Tucson, Arizona, this 9th day of Decem-
ber, 1922.

WM. H. SAWTELLE,

Judge. [148]

[Endorsed]: B-31—(Tucson). In the United
States District Court for the District of Arizona.
William Cowan, Appellant, vs. John P. Cull, Trus-
tee in Bankruptcy, in the Matter of Earl N. McKin-
ney, Bankrupt, Appellee. Order Enlarging Time to
Dec. 26, 1922, to Docket Appeal. Filed Dec. 9, 1922.

C. R. McFall, Clerk U. S. Dist. Court, Dist. of Arizona. [149]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

Citation (Copy).

United States of America,

Ninth Circuit,—ss.

To John P. Cull, Trustee in Bankruptcy in the
Matter of Earl N. McKinney, Bankrupt, Number B-31—(Tucson), United States District Court for the District of Arizona, GREETING:
YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, on the 15th day of November, A. D. 1922, pursuant to an Appeal allowed in the Clerk's office of the District Court of the United States for the District of Arizona, in the Matter of Earl N. McKinney, Bankrupt, wherein William Cowan is appellant, and John P. Cull, Trustee in Bankruptcy in the Matter of Earl N. McKinney, appellee, to show cause, if any there be, why the judgment in said Appeal

mentioned should not be corrected and speedy justice should not be done to the parties in their behalf.

WITNESS the Honorable JOSEPH McKENNA, Justice of the United States Court of Appeals for the Ninth Circuit, this 16th day of October, in the year of our Lord nineteen hundred and twenty-two.

[Seal]

WM. H. SAWTELLE,

District Judge of the United States District Court
for the District of Arizona.

Service of the above citation accepted this 27th day of October, 1922, by me, C. V. Manatt, Attorney of record of said J. P. Cull, Trustee, and I hereby enter my appearance for said J. P. Cull, trustee in the U. S. Circuit Court of Appeals.

C. V. MANATT,

Atty. for Trustee in Bankruptcy in the Matter of
Earl N. McKinney, Bankrupt. [150]

[Endorsement on back:] Filed Oct. 28, 1922.
United States District Court for the District of
Arizona. By Paul Dickason, Deputy Clerk. [151]

In the United States District Court for the District
of Arizona.

No. B-31 (TUCSON).

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the United States District Court for the District of Arizona, including the records, papers and files in the matter of Earl N. McKinney, Bankrupt, Numbered B-31—(Tucson) on the docket of said Court.

I further certify that the attached pages, numbered one to 153, inclusive, contain a full, true and correct transcript of certain records and proceedings in said case, as called for in the designation of record (*praecipe*), filed in this case and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my

office as such Clerk, in the City of Tucson, State and District aforesaid, except the "Order Appointing Trustee" called for in the 4th paragraph of said praecipe, and "Order Appointing Appraisers," as called for in the 5th paragraph of said praecipe, which are not included herein for the reason that I do not find any such papers or orders among the records and files in this case, and have heretofore so advised counsel for appellant.

I further certify that the Clerk's fees for preparing the transcript of this record amount to Eighty and No/100 [152] (\$80.00), and that the same has been paid to me in full by counsel for the appellant, William Cowan.

I further certify that the original Citation issued in this cause is attached hereto and made a part hereof.

WITNESS MY HAND and the seal of said court this 15th day of December, 1922.

[Seal]

C. R. McFALL,
Clerk United States District Court for the District of Arizona. [153]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

WILLIAM COWAN,

Appellant,

vs.

JOHN P. CULL, Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee.

Citation (Original).

United States of America,
Ninth Circuit,—ss.

To John P. Cull, Trustee in Bankruptcy in the
Matter of Earl N. McKinney, Bankrupt,
Number B-31—(Tucson), United States District
Court for the District of Arizona, GREETING:
YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear in the United States
Circuit Court of Appeals for the Ninth Circuit, to
be holden at San Francisco, California, on the 15th
day of November, A. D. 1922, pursuant to an appeal
allowed in the Clerk's office of the District Court
of the United States for the District of Arizona,
in the Matter of Earl N. McKinney, Bankrupt,
wherein William Cowan is appellant and John P.
Cull, Trustee in Bankruptcy in the Matter of Earl
N. McKinney, appellee, to show cause, if any there
be, why the judgment in said appeal mentioned
should not be corrected and speedy justice should
not be done to the parties in their behalf.

WITNESS the Honorable JOSEPH McKENNA, Justice of the United States Court of Appeals for the Ninth Circuit, this 16th day of October, in the year of our Lord nineteen hundred and twenty-two.

[Seal]

WM. H. SAWTELLE,

District Judge of the United States District Court for the District of Arizona.

Service of the above citation accepted this 27th day of October, 1922, by me, C. V. Manatt, attorney of record of said J. P. Cull, Trustee, and I hereby enter my appearance for said J. P. Cull, trustee in the U. S. Circuit Court of Appeals.

C. V. MANATT,

Atty. for Trustee in Bankruptcy in the Matter of Earl N. McKinney, Bankrupt.

[Endorsed]: No.— In the United States Circuit Court of Appeals for the Ninth Circuit. William Cowan, Appellant, vs. John P. Cull, Trustee in Bankruptcy in the Matter of Earl N. McKinney, Bankrupt, Appellee. Citation. Filed Oct. 28, 1922. C. R. McFall, Clerk United States District Court for the District of Arizona. By Paul Dickason, Deputy Clerk.

[Endorsed]: No. 3933. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Earl N. McKinney, Bankrupt. William Cowan, Appellant, vs. John P. Cull, as Trustee in Bankruptcy in the Matter of Earl N. McKinney, Bankrupt, Appellee. Transcript of Record. Upon

Appeal from the United States District Court for
the District of Arizona.

Filed December 18, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of EARL N. McKINNEY, Bankrupt.
WILLIAM COWAN,

Appellant and Petitioner,
vs.

JOHN P. CULL, as Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee and Respondent.

Brief of Appellant and Petitioner

Upon Appeal and Petition for Revision from the
United States District Court of the District
of Arizona.

Mr. David Benshimol, of Douglas, Arizona

Mr. Oscar T. Barber, of San Francisco, California
Attorneys for Appellant
and Petitioner

Filed this....., 1923.

.....
Clerk U. S. District Court of
Appeals, Ninth Circuit..

Service of two copies of within Brief of Appellant
and Petitioner is hereby acknowledged this
....., 1923.

.....
Attorney for Apellee and Respondent

NO. 3933

United States Circuit Court of Appeals
For the Ninth Circuit

In the Matter of EARL N. McKINNEY, Bankrupt.
WILLIAM COWAN,

Appellant and Petitioner,

vs.

JOHN P. CULL, as Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee and Respondent.

Brief of Appellant and Petitioner

Statement of Case.

On the 9th day of April, 1918, Earl N. McKinney filed in the District Court of the United States for the District of Arizona his petition in voluntary bankruptcy, (Transcript page 1) and by judgment of said District Court as aforesaid, was, on or about the 26th day of April, 1918, adjudicated a bankrupt; (Transcript, page II) that thereafter and in due course the administration of the estate of said bankrupt, one John P. Cull was by proper order and judgment of said United States District Court appointed trustee in bankruptcy for the estate of the said bankrupt,

That thereafter your petitioner was cited to appear as a witness before the Referee in bankruptcy on the 22d day of December, 1919, and testify re-

garding his several transactions with the said bankrupt; that on said date your petitioner duly appeared as a witness and was examined by said Referee regarding said transactions. (Transcript pages 50 and 51);

That thereafter, on the 16th day of February, 1920, said referee ordered your petitioner to appear before him at Douglas, Arizona, (Transcript page 78) on the 8th day of March, 1920, and show cause why your petitioner should not pay over to the estate of the bankrupt the sum of Five Thousand Thirty-Eight and 41/100 (\$5,038.41) Dollars. The Referee was not present until March 9th, 1920, on which date your petitioner and Appellant (Transcript of Record, page 79) specially appeared under protest for the purpose of pleading to the jurisdiction of said Referee, and of the said District Court, in the premises, setting forth the grounds for his plea of want of jurisdiction in said Referee and in said Court, (Transcript of Record, page 62) which said objection to jurisdiction was overruled by said Referee; and thereupon, under protest, your petitioner filed his answer to the Referee's Findings on Notice to Show Cause, showing among other things the following:

That he had not proved any claim against the estate of the bankrupt; that he did not owe the bankrupt or his estate anything; that any property he had in his possession had been delivered to him by the bankrupt under certain mortgages given by the bankrupt for valuable consideration long prior to the adjudication of the bankrupt in bankruptcy; that suit to foreclose these mortgages

had been begun several months prior to adjudications; that while pending there was an accounting and that an agreement for judgment was signed and filed in the pending suit; that subsequent to the adjudication and immediately after his appointment the trustee had been urged to take action relative to the property under foreclosure covered by the mortgages or relinquish any interest in the estate therein; that for more than six months after the adjudication the trustee failed to take any action whatever; that no appraisal of the bankrupt's estate or the property involved in the mortgages of this Appellant and Petitioner, has ever been made; that on the 16th day of December, 1918, said Cowan filed his formal judgment in the suit to foreclose; that prior to the date advertised for the sale the trustee brought suit in the Superior Court of Cochise County for an accounting for all the property covered by said mortgages and brought in said Superior Court a second suit to enjoin the sale on execution of the properties covered by said mortgages, on the 13th day of January, 1919, and secured an order from said Superior Court restraining the sale; that these two actions concerned the very matters involved in the show cause order above referred to and covered all the transactions between the bankrupt and said Cowan; that both of these actions were demurred to for want of equity and demurrers sustained; that the trustee appealed to the Supreme Court of the State of Arizona, from the order of the Superior Court sustaining the demurrer, to the action to restrain the foreclosure sale and from an order of said Court dis-

solving the restraining order, but did not perfect his appeal and dismissed both actions about November 1st, 1919; that the said Cowan thereupon proceeded to readvertise and sell under his execution; that the expense and upkeep of the property covered by said mortgages, cattle mostly, during said delays, was much in excess of any income derived from them; that the trustee had been guilty of laches and was seeking to profit by the expenditure of time and money by said Cowan in the care of and upkeep of the property in question without offering to do equity.

That on the 8th day of May, 1920, the Referee entered an order denying petition of Trustee for want of Jurisdiction. (Transcript of Record, page 66); that thereafter, to-wit: under date of May 16th, 1921, nearly a year after, the said Referee made certain Findings of Fact and Conclusions of law, finding and concluding your petitioner to be indebted to the estate of said bankrupt in the sum of Four Thousand Seven Hundred Five and 55/100 (\$4,705.55) Dollars, and recommending that the said District Court docket the matter, and render judgment for said sum of Four Thousand Seven Hundred Five and 55/100 (\$4,705.55) Dollars against said William Cowan, and in favor of said John P. Cull. (Transcript of Record, page 82).

That your petitioner immediately after receipt from the Referee of said findings of fact and conclusions of law, filed his certain petition for review in said District Court, (Transcript of Record, pages 88 to 168) moving that the entire proceedings of the Referee relative to the matter and things set

forth in the Referee's said findings of fact and conclusions of law on William Cowan's citation, dated May 16th, 1921, and which were mailed on June 22d, 1921 to, and received by, said William Cowan's attorney on June 23d, 1921, be reviewed. (See also Petition for Revision, pages 4-5).

Such proceedings were had on said petition for Review, that on September 5th, 1922, the said District Court being of the opinion that the Referee was within his rights and had proceeded lawfully in instituting summary proceedings, ordered, adjudged and decreed that the said findings of fact and conclusions of law made by the Referee be affirmed. (Transcript, pages 175-176).

Thereupon your petitioner and Appellant considering himself aggrieved by this order of the District Court respectfully applies to this Honorable Court for a revision and review of said order and appeals therefrom.

SPECIFICATION OF ERRORS.

I.

The Court erred in affirming the findings of fact and conclusions of law made by the Referee (Transcript of Record, page 82) for the reasons that:

A. (a) The referee had no jurisdiction in the matter involved,

(b) The said William Cowan objected to, and declared his intention to object to the taking of jurisdiction in said matter by the referee,

(c) The said William Cowan has never consented thereto.

B. That the subject matter involved in the proceedings is not, and was not within the jurisdiction of the referee to pass upon in a summary proceeding.

C. That the said William Cowan has not submitted himself and did not submit himself to the jurisdiction of the referee or the District Court except so far as was necessary for said Court to determine whether it had jurisdiction herein.

D. That the said referee and the District Court have no jurisdiction herein because the proceedings are not summary proceedings.

E. That this Court has no jurisdiction in this matter because William Cowan is and was in possession of all the matters and things herein involved as an adverse claimant.

F. That the said referee's overruling of objection to jurisdiction (Transcript of Record, page 86 paragraph VII) made by said William Cowan, was, for the matters herein recited, without legal effect.

G. That no foundation is laid in said findings of fact and conclusions of law for any summary proceedings herein.

H. That the referee had, and has no right to adjudicate upon the matters and things involved herein; that the only person entitled to bring suit or determine what is to be accounted for, is the trustee; that in such suit said William Cowan would, if he so desired, be entitled to a jury trial.

II.

The Court erred in affirming the findings of

fact and conclusions of law made by the referee for the reason:

A. That the trustee, John P. Cull, Esq., has twice begun litigation in the Superior Court of the County of Cochise, State of Arizona, upon the matters and things which are the subject of said findings of fact and conclusions of law, to-wit: an action for an accounting entitled "John P. Cull, Trustee, vs. William Cowan," numbered 2818, which action was begun on the 30th day of November, 1918, a certified copy of which is included in the record herein, (Transcript of Record, pages 94 to 136) and an action to enjoin the sale under foreclosures of the properties involved under the mortgages mentioned in said findings of fact and conclusions of law, which action was brought in said Superior Court on or about the 8th day of January, 1919, and is numbered 2861 and entitled "John P. Cull, Trustee, vs. William Cowan and James McDonald, Sheriff of Cochise County," a copy of which is included in the record herein, (Transcript of Record, pages 137 to 168) and the trustee having elected to pursue these matters in the Superior Court of Cochise County, is estopped to prosecute them elsewhere.

III.

The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason:

A. That certain of the findings of fact are based upon deductions of the referee and not upon any evidence, to-wit: that there were earnings from

the cattle or benefits from the property. (Transcript, page 85).

B. That the said findings of fact and conclusions of law are not based upon any evidence upon which to determine that the sum of One Thousand Two Hundred Sixty-Five and 58/100 (\$1,265.58) Dollars was unaccounted for.

IV.

The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason:

That there has been no fraud and there is no fraud alleged on the part of William Cowan, which would have been ground for these proceedings.

V.

The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that:

The trustee took no steps to redeem said property, and is guilty of laches; he also abandoned the suits.

ARGUMENT.

SPECIFICATION I.

It will be seen by reference to Transcript of Record, page 87, that there is no fraudulent preference or transfer involved herein; that there is no property right or right to possession involved and that the amount of money which is involved (\$4,705.55) is made of two items, first; \$1,265.58,

(Transcript, page 85) from dealings long before the bankruptcy and long before the suit referred to (See page 94, Transcript of Record) was filed, in which later suit an accounting of all matters was had with bankrupt, adjustments were made (See pages 120-121, Transcript of Record) and a confession of judgment entered; and secondly, from an amount charged by the referee as interest as against Appellant. (See also Transcript page 56).

A. The Court in *re Wood*, 278 Fed. 355, says:

“It is within the power of the bankruptcy court to assert and exercise a summary power over the property of a bankrupt or even of third persons holding property and claiming title, **provided** such claim is merely colorable or fraudulent. But inasmuch as such proceedings deprives a person of the usual due process of law, a summary order directing its surrender should be based upon facts which no fair mind can dispute.” Citing *Louisville Trust vs. Cominger*, 184 U. S. 24, (46 L. Ed. 413) and “It was never intended to deprive third parties, claiming property, of which they were in full possession, of the usual and due process of law.” Citing *Marshall vs. Knox*, 16 Wall. 551 (21 L. Ed. 481)

The Court on page 358 further says: “these and other questions—satisfy us the petitioners have a defense to the claim—and which they are now in part directed to pay over to the trustee. It is more than colorable, and is substantial. **It is a controversy** which should be determined in a plenary action and not by summary order.”

In the instant case Cowan claims and contends that he owes and owed McKinney nothing. (See also Transcript page 69, last paragraph). That during the accounting all items were accounted for; that there was an accounting. Cowan also contends that the referee's finding that the "use and benefit of the property should have more than paid the interest" (Transcript page 85, paragraph 5) raise clear controversies, properly to be adjudicated in a plenary action, especially since, as to this latter item there is no evidence and the charge of \$3,439.97 against Cowan is based upon an assumption of the referee.

See Weidhorn vs. Levy, 64 Law Ed. 898, which in its initial proceedings is very like this case. There the Petitioner objected to the jurisdiction and answered to the merits. The referee overruled the jurisdictional objection, proceeded to hear the merits and entered a decree in favor of the trustee. No bill in equity to the referee is found in this case. The referee, issuing his show cause order. (Transcript, page 78, at foot, also Transcript, page 61-9th line, et seq). See also in re Wood, Supra. In this case the property is not in the possession or control of the Court or bankrupt or anyone representing him at the time of filing bankrupt's petition, and not in the Court's custody at the time this controversy began or now. It involves nothing in the nature of a lien. A plenary suit is the only remedy.

See Babbit vs. Dutcher, 216 U. S. 102, 54 Law Ed. 402-406.

There is nothing in the Bankruptcy Act that extends the powers of the referee to cases like the present one.

Weidhorn vs. Levy, Supra, page 901.

(b-c) Cowan objected to the referee taking jurisdiction.

It will be noted that on **May 8, 1920**, the referee on **Trustee's** petition for an order to turn over all the proceeds of the sale of the property of the bankrupt, denied the motion for want of jurisdiction. (Transcript, page 66). It will also be noted that so far as Cowan is concerned, after the hearing, on **March 9th, 1920, nothing was done by the referee on this matter** until May 16, 1921, when the referee filed Findings of Fact and Conclusions of Law (Transcript, page 82). Memory only of the referee, seems to have been relied on, for on March 9th, 1919, Cowan objected to and protested his jurisdiction vigorously and did not give consent thereto or waive it.

It will be furthermore noted, that on March 9th, 1920, Cowan (Transcript, page 62) specially appeared under protest—and ever since has protested—the jurisdiction and procedure of the referee.

There is not even the pleading or petition of the Trustee attempted in the case of Weidhorn vs. Levy, Supra.

In a similar case the Court says in Galbraith vs. Vallely, 65 Law Ed. 843, while it might afford a more speedy and economical administration of the estate to maintain a summary proceeding such as this “the right to recover in such instances only

in suits of the ordinary character with rights and remedies incident thereto has been consistently maintained by this Court"—referring of course, to plenary suits. In the above mentioned case, the protest was intervened to the authority, as in this. (Page 79, Transcript and page 62). The record shows no waiver of objection or application for relief except as to jurisdiction—nor consent to jurisdiction. There is no record of any testimony on March 9th. (See Transcript 67-70).

SPECIFICATION I, (B to F inclusive).

An examination of the Bankruptcy Act clearly indicates the powers of the referee.

Consent was not given—protest against the referee taking jurisdiction was duly made (Transcript page 62-65)—in the proceeding no claim of fraud or fraudulent preference is made—no proceedings for the turning over to the trustee of property that belonged to the bankrupt's estate is indicated, but this is a proceeding to obtain from Cowan an accounting and the collection of an alleged sum of money, which after considering and reducing to a finality, certain transactions, might be found to be due the bankrupt's estate. Cowan's position since the start, has been as an adverse holder and as owing nothing. His position, as shown in Specification I, B to F, is that he is entitled to meet the claims made against him, in a plenary action, that the subject matter of the claims made must be tried to a Court or jury.

Louisville Trust vs. Cominger, Supra.

Weidhorn vs. Levy, Supra.

Galbraith vs. Valley, Supra.

In re Rathman, 183 Fed. 913. A very instructive case upon the matter in controversy.

Murphy vs. Hoffman Co., 211, U. S. 562.

Whitney vs. Wenman, 198 U. S. 539.

White vs. Schloerb, 178 U. S. 542.

A plenary suit must be brought by the trustee, either in law or equity, and in a Court of proper jurisdiction.

Babbit vs. Dutcher, 216, U. S. 113.

Mima vs. Parham, 193 Fed. 276.

Johnston vs. Spencer, 193 Fed. 275.

First National Bank vs. Hopkins, 199 Fed. 873.

United States Compiled Statutes, 1916, Vol. 9, (Sec. 9607), page 11332,

See citations as to waiver or consent:

“A respondent who files a paper in which he sets up that the Court is without jurisdiction of the action, and who repeats and urges the same objection in a proceeding to have the judge of the Court of bankruptcy review a decision of the referee adverse to him, cannot be said to have consented to the jurisdiction, although he also excepts to the petition as not stating a cause of action and further pleads a general denial.” Citing in re Michie, 116 Fed. 749.

“The consent of a defendant to be sued in the court of bankruptcy means consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure, which is regulated by general principles of

law, unless other provision is made." Citing *In re Raphael*, 192 Fed. 874. "And if the mode of procedure adopted is unlawful, the appearance of the defendant and his contesting the proceedings will not confer jurisdiction." Citing *Sinsheimer vs. Simonson*, 107 Fed. 898.

SPECIFICATION I. G.

It must be clear upon examination of the findings, that the referee from the facts set out, has attempted to determine that as a result of certain dealings, a debt is due the bankrupt's estate and how much. (See Transcript, pages 82 to 88).

United States Compiled Statutes, 1916, Vol. 9, (Sec. 9607), page 11326:

"If it shall be determined that the respondent's claim to the property is genuine and interposed in good faith and with the intention of supporting it, the court cannot proceed to inquire into the merits, but must dismiss the petition and remit the trustee to his remedy by a plenary suit. Citing *In re Rathman*, 183 Fed. 913; *In re Norris*, 177 Fed. 598; *In re Hayden*, 172 Fed. 623; *In re Ellis Bros.*, 156 Fed. 430; *In re Gilroy & Bloemfield*, 140 Fed. 733; *In re Kane*, 131 Fed. 386; *In re Teschmacher & Mrazay*, 127 Fed. 728; *In re Breslauer*, 121 Fed. 910; *In re Baird*, 116 Fed. 765; *In re Tune*, 115 Fed. 906; *In re Radley Steel Const. Co.*, 212 Fed. 462; *Courtney vs. Shea*, 225 Fed. 358.

"If the respondent's plea sets forth facts showing that his claim is adverse and in good faith, the trustee should file a pleading denying the averments relating to this point, and

an issue should be framed as to whether the claim pleaded is substantial or merely colorable, and this point should be decided on investigation; it is error simply to overrule the plea and proceed to judgment." Citing *In re Gill*, 190 Fed. 726; *In re Goldstein*, 216 Fed. 889.

"If there is nothing to impeach the good faith of the claim, and it is substantiated by verified pleadings or oral testimony, the issue cannot be heard summarily. (*In re Kane*, 131 Fed. 386). In fact, it has been said that it is only in clear cases, in which the proof is decisive, that the Court of bankruptcy is justified in making a peremptory order for the surrender of property." *In re Gilroy & Bloomfield*, 140 Fed 733.

SPECIFICATION I. H.

If the Trustee has a right to demand an accounting for the proceeds of the sale under foreclosure, then one of two things must be conceded; either the Trustee consented to the foreclosure after attempting to enjoin it, or tacitly, from his action, he must have abandoned any interest in the mortgaged property, for from the date of his appointment as trustee, April 27, 1918, until sometime after February 16, 1920, (Transcript, page 78) when the show cause order was issued to be served on this appellant—and from the date of the service of that show cause order to sometime after May 16th, 1921, more than two years after the trustee's appointment, he never attempted to take charge of said mortgaged property—put up any money to feed or care for the cattle or pay any

taxes upon the mortgaged real estate—all of which items undoubtedly this appellant would be entitled to credit for in any accounting had—in a plenary suit. Nor since said date has said trustee offered to, in any way, assume or pay the expense of maintenance of said properties.

Neither has the referee a right in a summary proceeding to dispose of the contention, that there had been an accounting between the bankrupt and the Appellant, as shown (Transcript, page 121). The appellant and petitioner contended that all accounts had been gone over. Even as to this the appellant would have been entitled to have been heard, in a plenary action, as to whether there was such an accounting—as to whether it was just and if it had been erroneously made.

Nor does the record disclose that there was any evidence of what the property in the hands of Cowan was actually worth at the time the petition of McKinney was filed. It is true that Cowan calculated interest upon the capital involved down to the date of the foreclosure sale, but in reason and therefore requiring proper evidence to disclose it, the **property** involved, earned a profit or made a loss up to the time of the foreclosure sale. The bankrupt's own testimony showed no income (while he had it) from the property as the expenses were equal to receipts (Transcript, page 29). Nowhere in the record is there evidence upon which the referee or this Court could determine that there were earnings or that because he, Cowan, was negligent, there should have been earnings. These are

matters that should be adjudicated in a plenary action.

Which ever way one turns, examining the facts in this case, the matter discloses that the matter in controversy must proceed as a plenary action.

The facts in this case reveal a somewhat similar position to that of the defendant in *Boston-Cerrillos Mines Corporation*, 206 Fed. 794. In that case if there had not been diversity of citizenship, the case could have proceeded as a summary one. Quoting the Court on page 797:

“It is true that under Sec. 23, of the Bankruptcy Act, a plenary suit of this character may not be prosecuted in the Federal Courts (save by consent) unless it be such a case as, had no bankruptcy supervened, might have been prosecuted in the Federal Court. But this seems to be such a case.”

Then follows the proposition of the diverse citizenship and jurisdictional amount.

SPECIFICATION II.

This case is in this court both on appeal and petition for revision.

Attention is called to the following facts, to-wit: that the trustee under instructions from the referee, brought suit in the Superior Court of Cochise County, Arizona, against this defendant for \$48,475; for an accounting and for adjustment of all claims between the parties (Transcript, page 94-

104) which suit was filed November 30th, 1918. An examination of the pleadings in that case, will disclose that the trustee was fully informed of the history of the transactions between the bankrupt and the said Cowan.

An examination of the answer (Transcript, page 126) and also the Record of proceeding had before the referee (Transcript, pages 71 to 81, and pages 188 to 191) will disclose that no appraisal of this bankrupt's estate has been made.

Attention is further called to a second suit brought by the trustee in said Superior Court and filed on the 8th day of January, 1919, (Transcript, pages 137 to 152) wherein the said trustee asked that not only the matters set forth in this new action, but also the matters and things prayed for in the first action be determined in it and that all matters in controversy be settled and determined in an **accounting**. In the latter action upon motion of Appellant and Petitioner herein, an injunction which had been served, restraining the foreclosure of the properties involved in the two actions was dissolved. From the order dissolving the injunction the trustee, on January 25, 1919, appealed to the Supreme Court of the State of Arizona. On the Trustee's motion, the judge fixed the amount of a supersedeas bond (Transcript, page 166). The appeal was never perfected (See Transcript, page 167).

To the first action, the Superior Court, on May 17, 1919, (Transcript, pages 135-136) sustained this Appellant's demurrer (Transcript, page 106). On motion of the Trustee (Transcript, page 136) under

date of November 8th, 1919, both actions were **dismissed**.

It is contended that all of the matters and things recited in the two actions were known to the referee; that he knew of the pendency of these two actions and that during all of the time it was necessary for this appellant to feed and take care of the cattle, which constituted a large part of the chattels under mortgage; that it is fair to assume with all the matters and things set forth herein that on November 8th, 1919, with the dismissal of the two actions, that the trustee had abandoned all interest in any and all of the property and things involved in the various matters, so far as the bankruptcy court was concerned and it is further contended that said suits so abandoned show that there existed a **controversy** which could only be adjudicated in a plenary action. It is yet further contended that if the procedure in the Superior Court was the proper procedure and the only one that from the facts could be maintained, that the trustee did abandon all claims, upon dismissing said actions on November 8th, 1919; for if there had been anything due from this appellant and petitioner the same could have been and would have been determined in said actions.

In re Rathman, Supra.

At the time of abandoning the suits in the Superior Court, November 8th, 1919, the statute of limitations had run (Transcript, page 136, paragraph 2; Transcript, page 167, paragraph 2) as to the alleged payments by the bankrupt on Septem-

ber 30th, 1916, (Transcript, page 68) Revised Statutes of Arizona, 1913, Sec. 711-1:

“There shall be commenced and prosecuted within three years after the cause of action shall have accrued, and not afterward, all action or suits in courts of the following description:

(1) Actions for debt where the indebtedness is not evidenced by a contract in writing.

At the time of abandoning the suits the foreclosure sale had not been made. The trustee abandoned the suits thus permitting the sale to proceed and stood by waiting for the sale and upon discovering that the sale produced more than was due at the time he, Cowan, took possession of the property, comes into Court and seeks the benefit of said sale without having done any act to preserve or maintain the property up to the time of the sale.

SPECIFICATION III.

A. Nowhere in this record can be found any evidence of any earnings or profits that would warrant the finding that there were earnings or profits.

Without a trial, without evidence, the referee determines, that Cowan was negligent in delaying the foreclosure of property in which neither the trustee nor the Court took any interest, and assuming without such evidence, that Cowan

is guilty of negligence, and assuming without such evidence, that there were or ought to have been profits, he determines that they are \$3,-439.97, (Transcript of Record, page 85) **and instead fines this appellant and petitioner** such sum and declares on page 87 of the Transcript that "Cowan has received in money and property belonging to the bankrupt estate the sum of \$4,705.55 (which sum includes the sum of \$1,265.58 referred to in paragraph at top of page 85 of Transcript).

B. The suits referred to herein (See Argument, Specification II) indicate the relation between the parties and clearly set forth that there had been an accounting between the parties, as a result of which an agreement for judgment had been signed. Could the referee arbitrarily decide to waive aside all the dealings between the bankrupt and Cowan and as arbitrarily decide that Cowan had **failed to account for a certain balance**. It is apparent that there were many dealings between the bankrupt and Cowan. It is also shown that under the mortgages something like \$1,900.00 was due for attorney's fees (Transcript, page 120, 3rd line from bottom) and that the bankrupt and this appellant had an accounting, (Transcript, page 121) and that the figures of \$1,900.00 attorney's fees were reduced to \$500.00 at said accounting. Can the referee arbitrarily cancel the agreement for the amount at which judgment was to be entered? The agreement which involves a deduction of about \$1,200.00 from the amount claimed by

Cowan against the bankrupt is to be respected. If there was an accounting, it cannot be arbitrarily set aside by the referee.

Corpus Juris (715), see Secs. 355 to 358.

Proof of mistake or fraud must be clearly shown.

Corpus Juris, Page 720, Sec. 371, and cases cited.

SPECIFICATION IV.

See argument under Specification I.

SPECIFICATION V.

The speculative and risky nature of the main items, cattle; the care necessary to preserve them; the fact that as a result of that care and handling and expenditure of time and money (Transcript, page 63) the cattle increased up to the time of foreclosure 30% and that increase was included in the cattle sold, all make it inequitable that the bankrupt's estate should benefit.

See 21 Corpus Juris, 233-Sec. 227.

Handt vs. Heidweyer, 152 U. S. 55.

and see Specification II-A.

The trustee, may not, as in this case, after Cowan had cared for the property, mostly cattle, and at his own expense, where he, the trustee has thus avoided the risks, assert his interest.

See 21 Corpus Juris, Page 225.

For the reasons herein set forth the appellant

and petitioner prays that said case be remanded to the District Court, directing that an order be entered by it that the proceedings invoked by the referee be dismissed for want of jurisdiction in him.

Respectfully submitted,

Attorneys for Appellant and Petitioner.

David L. Enghorn

of Douglas, Arizona.

Oscar L. Barber

of San Francisco, California.

United States
Circuit Court of Appeals
For the Ninth Circuit
SAN FRANCISCO, CALIF.

In the Matter of EARL N. McKINNEY, Bankrupt,
WILLIAM COWAN, Appellant and Petitioner,
vs.
JOHN P. CULL, Trustee, Appellee and Respondent.

Brief of Appellee and Respondent

**Appeal and Petition for Revision from the United
States District Court, Arizona District.**

C. V. Manatt, of Douglas, Arizona, Attorney for
Appellee and Respondent.

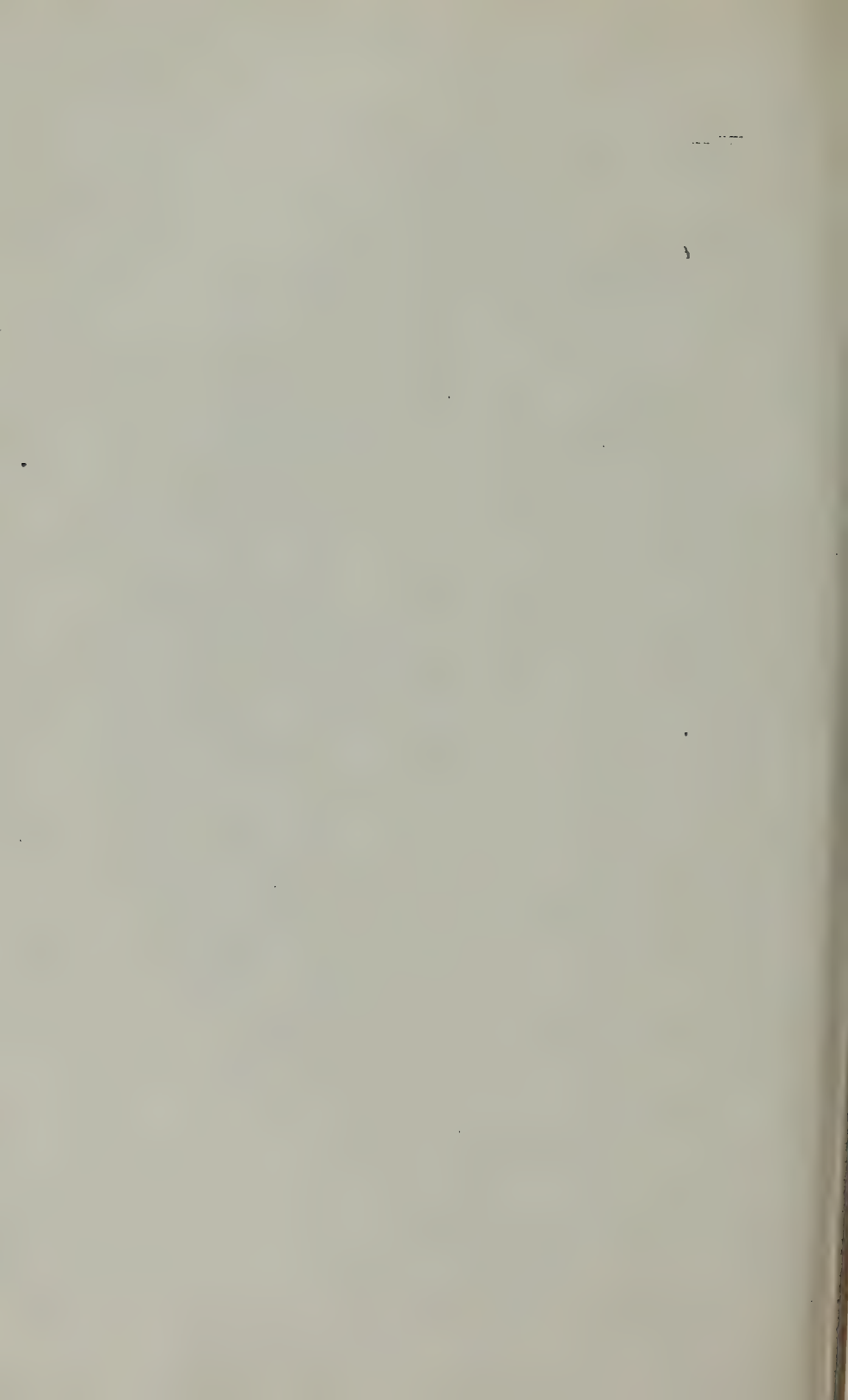
Filed this....., 1923

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Clerk of the Circuit Court of Appeals
Ninth Circuit.

Service of three copies of the within brief of ap-
pellee acknowledged this.....day of
....., 1923.

.....
Attorney for Appellant and Petitioner.

FILED
APR 11 1923
U. S. DISTRICT COURT
SAN FRANCISCO, CALIF.



**UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE NINTH CIRCUIT**

SAN FRANCISCO, CALIF.

In the Matter of EARL N. McKINNEY, Bankrupt,
WILLIAM COWAN, Appellant and Petitioner,

vs.

JOHN P. CULL, Trustee in Bankruptcy, Appellee
and Respondent.

BRIEF AND ARGUMENT OF APPELLEE.

Statement of Case.

A full and complete statement of the case we believe to be an aid to a full and complete understanding of the matters involved in and at issue in the foregoing cause.

For some years prior to November 1st, 1917, the bankrupt Earl N. McKinney was engaged in the Dairy business near Douglas, Arizona, and had accumulated considerable property both real and personal, variously estimated to be of the value of from \$30,000.00 to \$45,000.00, and had from time to time borrowed sums of money from the Appellant William Cowan, and at or about November 1st, 1917, owed said Cowan something over \$19,000.00 including accrued interest as Cowan then claimed.

That about November 1st, 1917, arrangements were made between McKinney, bankrupt, and Cow-

an whereby the possession of all the property of the Bankrupt was turned over to Cowan under his mortgages, and the Dairy business was to be run by Cowan under the management of McKinney, until the business would liquidate the then indebtedness of McKinney's to Cowan, and then the property and business was to be turned back to McKinney Bankrupt free and clear of all liens and claims.

This arrangement went into effect November 2nd, 1917, and McKinney was employed as manager or other employee, which arrangement endured up to April 1st, 1918, when McKinney quit the arrangement for reasons which he sets out in his testimony.

That about the 1st of January, 1918, and during the time the business was being conducted under the oral arrangement as set out, Cowan began suit in the Superior Court of Cochise County, Arizona, to foreclose his various mortgages on the property of Bankrupt, claiming due the sum of \$19,901.68, and on the 8th day of January, 1918, a tentative order was made by the Court granting judgment for that sum with \$500.00 attorney's fees on the presentation of written judgment, which written judgment was not presented to the Court and signed until the 16th day of December, 1918.

That Cowan remained in possession of the property during all the time up to November 25th, 1919, and 28th day of November, 1919, when the property was sold to Cowan under order of sale and execution under the judgment above, personal property

November 25th for the sum of \$15,736.55 and realty November 28th for the sum of \$8,612.78 or the total of \$24,349.34 being the full sum due Cowan on his judgment with 10% interest from January 8th, 1918.

That the accumulated interest on the judgment or the sum of \$3,439.97 was collected by sale by Cowan, and since the 2nd day of November, 1917, Cowan had full and complete possession of all the property of the Bankrupt, and the use and profits derived therefrom, and at no time was any credit given to the estate of Bankrupt.

That the Trustee did bring suit for accounting, and after this suit was instituted and pending did start suit to enjoin the Sheriff from selling this property until an accounting was had, to which suits the Court promptly dissolved the temporary restraining order, and sustained demurrers to the two complaints, and the causes were dismissed without taking an appeal.

That the Trustee filed claim that Cowan owed the estate various sums of money which had been paid him by Bankrupt, and not credited and had held the property for over two years, used and run the same without having paid the estate for the use of same, and had during the time of his use computed and collected 10% interest on his mortgages against the same during all such time, and the Trustee asked that said Cowan and Bankrupt be cited to appear for examination, and the Bankrupt did appear and Cowan failed to do so, and on the evidence adduced the referee found that Cowan

owed the estate the sum of \$5,038.41 which sum was made up from the sums of \$1,265.54 as amount received at various times by Cowan and no credit given for same, the sum of \$3,439.97 interest charged by Cowan and collected while he let his judgment stand without action, and the sum of \$300.00 and some interest on an automobile deal sued on and no money advanced.

On this finding of the Referee in Bankruptcy a Citation was issued to Cowan to show cause why he should not pay to the Trustee for the Bankrupt estate the sum of \$5,038.41, and on this order to show cause Cowan filed his objections to Jurisdiction, as well as to the merits and asked for relief, and after a hearing before the referee, Cowan, testifying, the Referee allowed Cowan a reduction of the amount of the sum claimed due from him in the sum of \$300.00 and some interest claimed due the estate from the automobile deal, and finally ordered Cowan to pay to trustee the sum of \$4,705.55 instead of the sum of \$5,038.97.

That on this finding and order so made on Cowan, he prosecuted his petition for review, to the District Court of the United States for the District of Arizona, and after hearing the Court Judge Sawtelle sitting, confirmed and approved the findings of the Referee, and ordered judgment on the same against Cowan, and from which order and judgment this proceeding is prosecuted in this Court.

ARGUMENT.

In taking up the argument of the questions involved, we shall not strictly follow the order set out by the Appellant, as some and much of the time used by him in his brief, and argument is devoted to questions that are not vital, or of decisive importance in our opinion for a right determination of the cause.

The vital question here presented, is was the proceeding had by the Referee in Bankruptcy a Summary proceeding, legal and proper?

If the Court should determine this question in favor of Appellee and as determined by the Referee and District Court, then there can be no question of jurisdiction, nor the waiver thereof, for if this proceeding had before the Referee, was legal and proper he had full and complete jurisdiction to determine the matter, and whatever orders or judgment was found and entered, and as approved and confirmed by the District Court, under petition for review, such judgment or orders are conclusive, unless properly appealed from, which was not done by Appellant, as the record discloses, that the matter went from the Referee in Bankruptcy on petition for review only.

Our first consideration then is, under the facts as here presented was a Plenary suit necessary to be instituted by the Trustee against William Cowan to collect the sums due the estate.

To necessitate the institution of a Plenary suit there must be property rights to be settled and at

issue or the right of possession of property all in legal dispute.

There was nothing of this kind involved in the case at bar but the whole transaction was a matter of computation, and a matter that could be arrived at summarily.

The first item in which the Trustee claimed due from Cowan was the matter of how much the Bankrupt had paid Cowan from sales of mortgaged cattle and what amount Cowan had credited him with from those transactions.

The evidence of the Bankrupt and Cowan was taken on this matter and both agreed that the Bankrupt had paid Cowan something over \$2,400.00 and Cowan could show that he had credited the Bankrupt with something over \$1,100.00 of this amount, and found that the estate of the Bankrupt was entitled to the sum of \$1,265.58 or the sum that Cowan had failed to give credit for.

In this inquiry, every opportunity was given Cowan, no legal right was he deprived of, as he was given credit for every cent he could show he was entitled.

It would do violence to justice, to hold that on such transactions a plenary suit should be instituted which would delay and be expensive.

The other item of \$3,439.97 found by the Referee due the estate of the Bankrupt or Trustee from Cowan arose in this wise.

Cowan had taken over all the property of the Bankrupt on November 2nd, 1917, under the arrangement that he would run the business until

the business had made his indebtedness due him from the Bankrupt.

Cowan under such arrangement retained the possession of and operated the Bankrupt Dairy business and used and controlled all this property estimated to be of the value of from \$30,000.00 to \$45,000.00 and while this arrangement was being operated and in full force Cowan started his suit in the Superior Court of Cochise County, Arizona, to foreclose his several mortgages against the Bankrupt, and on the 8th day of January, 1918, under confession of judgment order for judgment was entered by the Court.

Cowan permitted this matter to rest for nearly a year before he caused formal entry of judgment to be made.

That after judgment entered he allowed his judgment to remain dormant until November 25th and 28th, 1919, when he bid in all the property for the sum of \$24,349.34 which sum and amount was the amount of the judgment of January 8th, 1918, with Ten per cent interest from that date, the item of interest being the sum of \$3,439.97.

The Referee found that this sum of interest was a surplus over and above the amount really due Cowan on his mortgage, and should be turned over to the Trustee as a part of the Bankrupt's estate.

To let Cowan keep this as interest and charge him with the value and profits of the use of the property, would entail much litigation, long delay with uncertain results, as the Trustee had no records or other items on which to maintain suit with

success, and such conclusion is just, fair and equitable, as Cowan in good conscience could not expect to use and possess all the property and get the profits and benefits therefrom for nearly two years and at the same time claim and collect his 10% interest.

If this property when sold had brought the sum of \$30,000.00 instead of the sum of \$24,349.34 the item of surplus of something over \$5,000.00 would be due and payable to the Trustee without question, and the Referee in his findings and adjustment between Cowan and the Estate found that the property brought at judicial sale \$3,439.97 more than Cowan had a right to and properly ordered him to pay same over to the Trustee for the benefit of the Bankrupt estate, all a matter of equity and computation.

This we think fairly presents the matters to this Court, and fairly presents the legal phase at least from our standpoint and all being a mere matter of justice, right and equity, and no property rights that can be legally in dispute or issue, the proceedings had were proper and right, with full jurisdiction in the Bankruptcy Court to determine all matter presented.

We are met at the outset with many Court constructions of the Bankrupt Act in which Courts have considered the Bankrupt side of the District Courts and its Referee little better than Courts not of record. However, by amendment, especially the Amendment of 1903 has given to the Jurisdiction of the Bankruptcy side of the District Court

a more general jurisdiction, and later Decisions of the Courts are much more liberal in this respect, as they begin to recognize the absolute necessity of the Bankruptcy Court being recognized as something more than a mere name and having something more than clerical duties to be performed by the Referee.

See:

In Re Knopf 16 Am. B. R. 432, 144 Fed. 245.
Mueller vs. Nugent, 184 U. S. 1, 7 Am. B. R. 224.

Knapp vs. Spencer, 20 Am. B. R. 355.

Operators Piano Co. vs. First Wis. Trust Co., 283 Fed. 904.

Murphy vs. Hoffman, 211 U. S. 568, 53 L. Ed. 327.

Franzen vs. C. M. & St. P. (C. C. A.) 278 Fed. 370.

In re Dunaway, 275 Fed. 591.

II.

Our contention is further that if any Jurisdictional question arises in favor of the Appellant, the same was by him waived, and his acts and relief asked for and given in law is in effect a consent to this jurisdiction.

In taking up this feature of the brief we in no wise desire to be understood as in any measure abandoning our position that this is properly a summary proceeding as no title or property rights were involved.

The facts on which we base our position were as follows:

On the citation to Appellant to show cause why he should not pay the Trustee the sum of \$5,038.41, Appellant came in and filed what he now denominates plea to jurisdiction. (Abs. 62-65).

If we interpret this plea correctly, it is a plea to the merits as well as jurisdiction, and at least on such plea Appellant testified and was heard on the merits and after the hearing, was given affirmative relief, in this, to-wit: the item of \$300.00 and interest on the automobile was cut out of the amount of the Referee's findings solely on the showing made by Appellant. (Ab. 67).

There are many adjudicated cases which hold that after objection to jurisdiction, the objector may participate in the proceedings in an immaterial manner and not subject himself to the jurisdiction objected to, but there are no cases which hold that a party may object to the jurisdiction and at the same time plead to the merits and appear, and by his exclusive testimony obtain from that jurisdiction affirmative relief as in the case at bar, and still effectively rely on his objection to jurisdiction.

Sheppard vs. Lincoln, 25 Am. B. R. 804. 184 Fed. 182.

Ryttenburg vs. Schaferll, Am. B. R. 652. 131 Fed. 313.

III.

The Appellant spends much time, energy and space on the two cases that was instituted at one time in our Superior Court, but as the record discloses no results were realized from these cases and

because we saw the error of our ways, and changed the procedure and efforts in the Bankruptcy Court does not establish any legal matter favorable to Appellant.

These cases were started and afterward dismissed, and if any attempt was made to appeal same, it was unknown to the writer of this brief but no matter what the record may show as to this feature or any other feature of that abortive litigation, I cannot see how it can affect the rights of the parties to this proceeding here being considered, or in any way assist this Court in the determination of the issues here presented.

IV.

Appellant has taken some space to argue the facts, we assume the purpose of this part of the brief is to show the conclusions of the Referee, and the District Court, is not sustained by the evidence.

We are not inclined to discuss this matter in this Court, as the Court is well aware, there was preserved only an abstract of the testimony heard by the Referee which appears in our abstract of record and under these circumstances the findings of the Referee and Court are conclusive unless the testimony in full had been preserved, which is not true here.

In Conclusion we desire to state, that actual justice having been meted out between contesting parties, and because the conclusions of the Referee, as confirmed and approved by the District Court, are right, submit that the judgment of the lower

Court should be affirmed in all things, and that such judgment be recovered with 6% interest from the date of the findings of the Referee.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "C. V. Marshall", is written over a horizontal dashed line.

Attorney for Appellee.
Douglas, Arizona.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of EARL N. McKINNEY, Bankrupt.

WILLIAM COWAN,

Petitioner,

vs.

JOHN P. CULL, as Trustee in Bankruptcy of the
Estate of EARL N. McKINNEY, Bankrupt,
Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, a Certain
Order of the United States District Court for the
District of Arizona.

FILED
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F. D. MONOKTON,
CLERK.

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of EARL N. McKINNEY, Bankrupt.

WILLIAM COWAN,

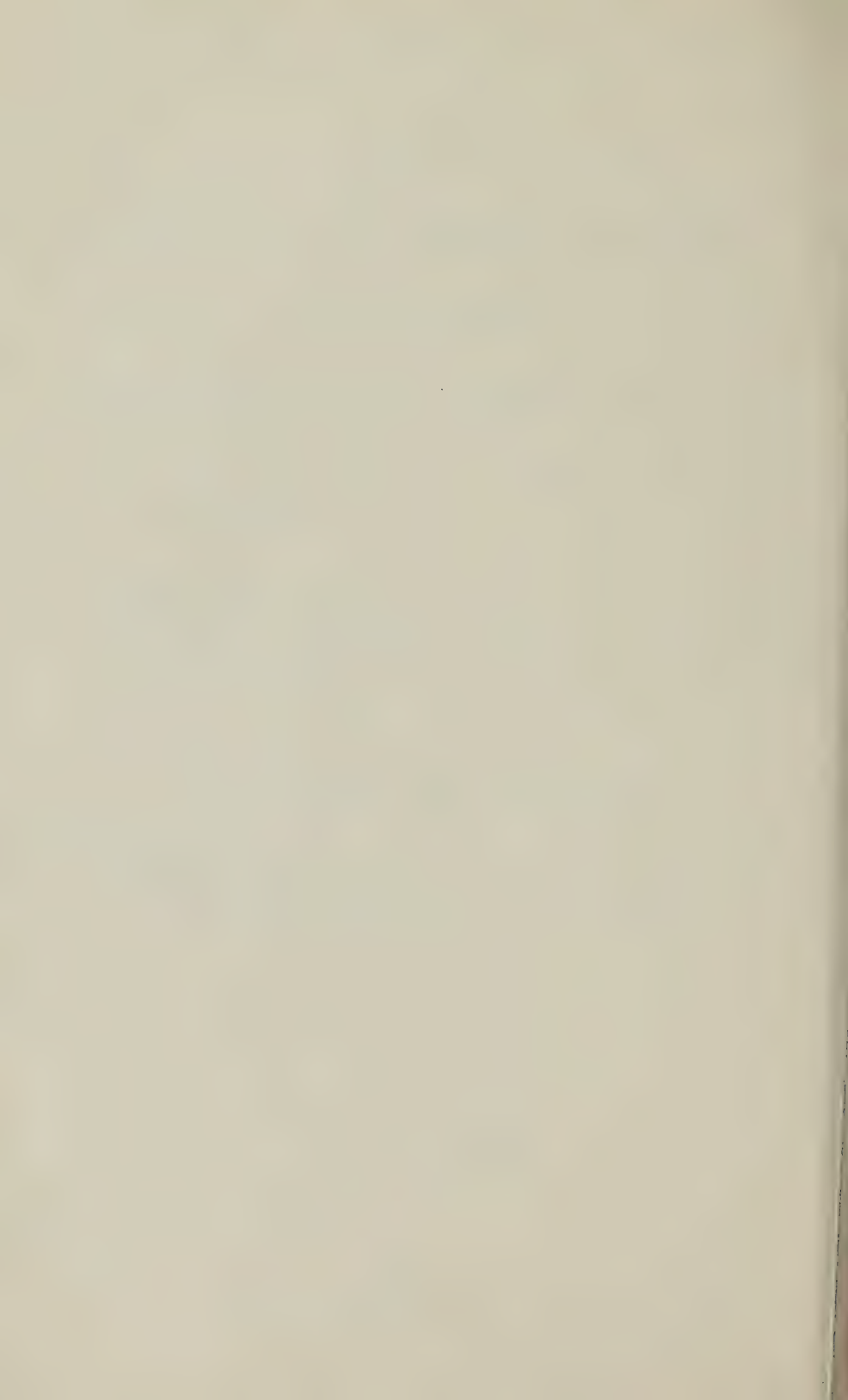
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bank-
rupt.

Petition for Revision.

To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The petition of William Cowan respectively
shows as follows:

I.

That on the 9th day of April, 1918, Earl N. McKinney filed in the District Court of the United States for the District of Arizona his petition in voluntary bankruptcy, and by judgment of said District Court as aforesaid, was, on or about the 26th day of April, 1918, adjudicated a bankrupt; that thereafter and in due course of the administration of the estate of said bankrupt, one John P. Cull was by proper order and judgment of said United States District Court appointed trustee in bankruptcy for the estate of the said bankrupt, and said John P. Cull ever since has been and is now the duly appointed, qualified, and acting trustee in bankruptcy for said estate.

II.

That thereafter your petitioner was cited to appear as a witness before the Referee in bankruptcy on the 22d day of December, 1919, and testify regarding his several transactions with the said bankrupt; that on said date your petitioner duly ap-

peared as a witness and was examined by said Referee regarding said transactions. [1*]

III.

That thereafter, on the 16th day of February, 1920, said referee ordered your petitioner to appear before him at Douglas, Arizona, on the 8th day of March, 1920, and show cause why your petitioner should not pay over to the estate of the bankrupt the sum of Five Thousand Thirty-eight and 41/100 (\$5,038.41) Dollars.

IV.

That thereupon your petitioner specially appeared, under protest for the purpose of pleading to the jurisdiction of said Referee, and of the said District Court, in the premises, setting forth the grounds for his plea of want of jurisdiction in said Referee and in said Court, which said objection to jurisdiction was overruled by said Referee; and thereupon, under protest, your petitioner filed his answer to the Referee's Findings on Notice to Show Cause, showing among other things the following;

That he had not proved any claim against the estate of the bankrupt; that he did not owe the bankrupt or his estate anything; that any property he had in his possession had been delivered to him by the bankrupt under certain mortgages given by the bankrupt for valuable consideration long prior to the adjudication of the bankrupt in bankruptcy; that suit to foreclose these mortgages had been begun several months prior to adjudi-

*Page-number appearing at foot of page of original certified Transcript of Record.

cations; that while pending there was an accounting and that an agreement for judgment was signed and filed in the pending suit; that subsequent to the adjudication and immediately after his appointment the trustee had been urged to take action relative to the property under foreclosure covered by the mortgages or relinquish any interest in the estate therein; that for more than six months after the adjudication the trustee failed to take any action whatever; that on the 16th day of December, 1918, said Cowan filed his [2] formal judgment in the suit to foreclose; that prior to the date advertised for the sale the trustee brought suit in the Superior Court of Cochise County for an accounting for all the property covered by said mortgages and brought in said Superior Court a second suit to enjoin the sale on execution of the properties covered by said mortgages, on the 13th day of January, 1919, and secured an order from said Superior Court restraining the sale; that these two actions concerned the very matters involved in the show cause order above referred to and covered all the transactions between the bankrupt and said Cowan; that both of these actions were demurred to for want of equity and demurrer sustained; that the trustee appealed to the Supreme Court of the State of Arizona, from the order of the Superior Court sustaining the demurrer, to the action to restrain the foreclosure sale and from an order of said Court dissolving the restraining order, but did not perfect his appeal and dismissed both actions about November 1st, 1919; that the said Cowan thereupon proceeded

to readvertise and sell under his execution; that the expense and upkeep of the property covered by said mortgages, cattle mostly, during said delays, was much in excess of any income derived from them; that the trustee had been guilty of laches and was seeking to profit by the expenditure of time and money by said Cowan in the care of and upkeep of the property in question without offering to do equity.

V.

That thereafter, to wit, under date of May 16th, 1921, the said Referee made certain findings of fact and conclusions of [3] law, finding and concluding your petitioner to be indebted to the estate of said bankrupt in the sum of Four Thousand Seven Hundred Five and 55/100 (\$4,705.55) Dollars, and recommending that the said District Court docket the matter, and render judgment for said sum of Four Thousand Seven Hundred Five and 55/100 (\$4,705.55) Dollars against said William Cowan, and in favor of said John P. Cull.

VI.

That your petitioner immediately after receipt from the Referee of said findings of fact and conclusions of law, filed his certain petition for review in said District Court, moving that the entire proceedings of the Referee relative to the matter and things set forth in the Referee's said findings of fact and conclusions of law on William Cowan's citation, dated May 16th, 1921, and which were mailed on June 22d, 1921 to, and received by, said William Cowan's attorney on June 23d, 1921, be

reviewed upon the grounds and for the reasons set forth in the assignments of error filed herewith and in support hereof, a copy of which petition for review being also filed herewith.

VII.

Such proceedings were had on said petition for Review, that on September 5th, 1922, the said District Court being of the opinion that the Referee was within his rights and had proceeded lawfully in instituting summary proceedings, ordered, adjudged and decreed that the said findings of fact and conclusions of law made by the Referee be affirmed. [4]

VIII.

Your petitioner, considering himself aggrieved by this order of the District Court respectfully applies to this Honorable Court for a revision and review of said order to the end that the said order of the District Court be reversed, and said findings of fact and conclusions of law be revised to show that your petitioner is in no way indebted to the estate of said bankrupt, and that such orders emanate from this Court as are necessary to that end. For this purpose your petitioner has prayed the District Court that the transcript of record, papers and proceedings upon which said judgment or decree was made, duly authenticated, may be sent up to this Court, and your petitioner hereby makes reference to the said transcript of record, papers and proceedings, and hereby incorporates and makes the same a part hereof, to the end that your Honorable Court be enabled to review and correct

the action of the District Court with due care and justice to all concerned.

DAVID BENSHIMOL,
Attorney for Petitioner.

State of Arizona,
County of Cochise,—ss.

David Benshimol, being duly sworn, says, that he is the attorney for William Cowan, petitioner; that he has read the foregoing petition, and that the same is true of his own knowledge, except as to those matters and things set out on information and belief, and as to those, he believes it to be true.

DAVID BENSHIMOL.

Subscribed and sworn to before me this 7th day of October, 1922.

GAYLE H. NICHOLS,
Notary Public.

My commission expires Feb. 23, 1926. [5]

In the District Court of the United States for the
District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL McKINNEY, Bankrupt.

Assignment of Errors.

Comes now William Cowan, petitioner in the above-entitled matter, and makes and files the following assignment of errors, upon which he will rely upon the prosecution of his appeal from that certain order, judgment, or decree made by this Honorable Court, and entered in the above-entitled matter on the 5th day of September, 1922:

First: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the referee had no jurisdiction in the matter involved, and the said William Cowan specifically objected to, and declared his intention to object to the taking of jurisdiction in said matter by the referee, and has never consented thereto.

Second: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the subject matter involved in the proceedings is not, and was not within the jurisdiction of the referee.

Third: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the said William Cowan has not submitted himself, and does not now submit himself to the jurisdiction of the referee, or this Court, except so far as submission, specially may be necessary for this Court to determine whether it had jurisdiction herein.

Fourth: The Court erred in affirming the findings of fact [6] and conclusions of law made by the referee for the reason that the said referee and this Court have no jurisdiction herein, these proceedings being summary proceedings.

Fifth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that this Court has no jurisdiction in this matter because William Cowan is and was in possession of all the matters and things herein involved as an adverse claimant.

Sixth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the said referee's overruling of objection to jurisdiction made by said William Cowan, was, for the matters herein recited, without legal effect.

Seventh: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that no foundation is laid in said findings of fact and conclusions of law for any summary proceedings herein.

Eighth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the referee had, and has no right to adjudicate upon the matters and things involved herein; that the only person entitled to bring a suit or determine what is to be accounted for, is the trustee; that in such suit said William Cowan would, if he so desired, be entitled to a jury trial.

Ninth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the matters and things involved in said findings of fact and conclusions of law are not based upon any petition for relief, or request to the referee for relief on the part of William Cowan.

Tenth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that [7] there does not appear to have been any application on file in the matter of

this estate on the part of the trustee invoking action by the referee.

Eleventh: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the matters and things involved in the findings of fact and conclusions of law are not based upon any hearing on December 22d, 1919, in which said William Cowan appeared as a party; but it appears that on said date said William Cowan was summoned as a witness to testify as to his transaction with bankrupt.

Twelfth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the trustee, John P. Cull, Esq., has twice begun litigation in the Superior Court of the County of Cochise, State of Arizona, upon the matters and things which are the subject of said findings of fact and conclusions of law, to wit: an action for an accounting entitled "John P. Cull, Trustee, vs. William Cowan," numbered 2818, which action was begun on the 30th day of November, 1918, a certified copy of which is included in the record herein; and an action to enjoin the sale under foreclosures of the properties involved under the mortgages mentioned in said findings of fact and conclusions of law, which action was brought in said Superior Court on or about the 8th day of January, 1919, and is numbered 2861 and entitled "John P. Cull, Trustee, vs. William Cowan and James McDonald, Sheriff of Cochise County," a copy of which is included in the record herein.

Thirteenth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that certain of the findings of fact are based upon deductions of the referee and not upon any evidence, to wit, that there were earnings from the cattle or benefits from the property, [8] when in truth and in fact the holdings in possession by said William Cowan pending the delays by the trustee in determining whether he wished to redeem the property from the mortgages to said William Cowan, for the benefit of the estate; and the litigation started by said trustee and carried to the point of the limit of time to complete appeal to the Supreme Court of the State of Arizona, which litigation was then, to wit, on November 8th, 1919, dismissed; caused expense in excess of the interest accruing upon the mortgages held by said Cowan, and any increase in the number of cattle held; that although said William Cowan bid the amount of his said mortgages and interest, at the foreclosure sale, the trustee did not at any time offer to pay said bankrupt's indebtedness to said William Cowan, or offer to bid at said sale, and there is no evidence showing that the property sold at foreclosure sale was of the value that said William Cowan bid thereon.

Fourteenth: The Court erred in affirming the findings of fact and conclusions made by the referee for the reason that the said findings of fact and conclusions of law are not based upon any evidence upon which to determine that the sum of One Thousand Two Hundred Sixty-five and 58/100 (\$1,265.-

58) Dollars was unaccounted for, for two reasons: (1) that the bankrupt had other dealings with said William Cowan than those involved in the mortgages foreclosed; and (2) that all accounts and matters involving all transactions between said bankrupt and said William Cowan were adjusted and settled in the agreement for judgment signed by the bankrupt on January 8th, 1918; that by the terms of the mortgages and notes, upon which said William Cowan was then foreclosing, the said bankrupt was obligated to pay as attorney's fees thereon, in case suit was brought, the sum of One Thousand Nine Hundred Seventy-four and 59/100 (\$1,974.59) Dollars; that said accounting was completed as to all matters [9] between the bankrupt and said William Cowan and said bankrupt owed said William Cowan the said sum of One Thousand Nine Hundred Seventy-four and 59/100 (\$1,974.59) Dollars, as well as the principal and interest of said mortgages.

Fifteenth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that there has been no fraud and there is no fraud alleged on the part of William Cowan, which would have been ground for these proceedings.

Sixteenth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the property involved in the bankrupt's estate, mortgaged to William Cowan, was at the time of the adjudication, and for a long time after, subject to redemption by the

trustee, and that the trustee took no steps to redeem said property, and is guilty of laches.

In order that the foregoing assignment of errors may be and appear of record, the petitioner presents the same to the Court, and prays that such disposition be made thereof as in accordance with law and statutes of the United States in such case made and provided, and petitioner prays a reversal of said order, judgment, or decree appealed from, and each and every part thereof, entered by the United States District Court for the District of Arizona, and a revision of said order, judgment, or decree appealed from, and each and every part thereof.

DAVID BENSHIMOL,
Attorney for Petitioner. [10]

In the District Court of the United States for
the District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

**Petition of William Cowan for a Review of the
Referee's Findings of Fact and Conclusions
of Law on Citation of This Petitioner Dated
May 16, 1921.**

Your petitioner respectfully represents:

1.

That he is the person named in the proceedings herein entitled "Referee's Findings of Fact and Conclusions of Law on William Cowan's Citation," dated May 16th, 1921.

2.

That your petitioner prays the Honorable Court to review said proceedings and the whole thereof. And your petitioner further represents:

3.

That the referee is without jurisdiction and that this Court is without jurisdiction to hear, consider or determine the matters sought to be adjudged in the proceedings before the referee and this Court is without jurisdiction to hear or determine any of the matters and things set forth in the Referee's findings of fact and conclusions of law, dated May 16th, 1921.

4.

That said referee is without jurisdiction and the Court is without jurisdiction of the person of your petitioner in the premises.

5.

That your petitioner has not submitted himself to the jurisdiction of the Referee, nor to the jurisdiction of this Court, and has not consented that the right of property in said proceedings [11] involved; should be determined by said Referee or by this Court, upon summary proceedings herein.

6.

That your petitioner especially denies the jurisdiction of said Referee and especially denies and objects to the jurisdiction of the Court, to proceed further herein.

7.

That said proceedings before the Referee were

arbitrary and unlawful in that same were not initiated upon petition or showing made by the Trustee.

8.

That said proceedings before the Referee and any order or findings sought to be predicated thereupon, were arbitrary and unlawful in that your petitioner's claim to the property and moneys sought to be taken by the Referee, were adverse to the Bankrupt.

9.

That it appears from the findings and conclusions that the Referee is estopped for laches from asserting any claim in behalf of the bankrupt's estate, by reason of failure of the Trustee to redeem the mortgaged property.

10.

That it appears from the findings of the Referee that an attempt is made in summary proceedings to effect and adjudicate an accounting between petitioner and the Bankrupt.

11.

That it appears from the findings of the Referee that an attempt is made to adjudicate matters and issues that can only be determined in a plenary action.

12.

That it does not appear from the proceedings that this petitioner holds any property or moneys of the bankrupt as agent, representative or naked bailee. [12]

13.

That it appears from the record that the matters and things attempted to be adjudicated by the Referee are adjudicated.

14.

That it appears from the proceedings and from the record that all matter and things over which the Referee attempts to exercise jurisdiction, have been determined in a plenary action in a Court of competent jurisdiction.

And your petitioner further represents:

15.

That all moneys and property of every nature and kind whatsoever received by him from said bankrupt or of and from the proceeds of sale upon foreclosure of mortgages are declared by your petitioner to be his own, and same are now and at all times have been held adversely to said bankrupt.

16.

That it appears from the record that a real adverse claim to the property sought to be reached exists in favor of the petitioner.

17.

That there is no evidence in the record to support the findings of the referee and said findings do not support the conclusions of law reached by said referee.

18.

That all the acts, proceedings, orders and findings, so made by the Referee are void and of no effect, and same appears upon the face of the record.

And your petitioner further represents:

19.

That John P. Cull, the duly qualified and acting trustee herein did on November 30, 1918, file his certain action in the Superior Court of the State of Arizona, in and for Cochise County, a court of competent jurisdiction, against this petitioner, said cause being numbered 2818, a certified copy of the record whereof is hereto [13] attached, marked Exhibit "A" and made a part of this petition by reference.

That in said action next before referred to the said Trustee sought an accounting of the defendant in respect to all the matters and things sought to be determined by the Referee in these proceedings, and in which said action the petitioner joined issue by filing his demurrer and answer, and that the issues and matters and things in said action referred to were on May 17, 1919, adjudicated in favor of this petitioner and against said Trustee, and judgment therein in favor of your petitioner has become final.

20.

That John P. Cull, the duly qualified and acting trustee herein did on the 8th day of Jan., 1919, file his certain action in the Superior Court of the State of Arizona, in and for Cochise County, a Court of competent jurisdiction, against this petitioner and against the Sheriff of Cochise County, said cause being numbered 2961, a certified copy of the record whereof is hereto attached, and marked

Exhibit "B" and made a part of this petition by reference.

That in said action next before referred to, the said Trustee sought to restrain this petitioner and the Sheriff of Cochise County from proceeding with the sale under judgment, rendered in mortgage foreclosure proceedings against the properties of the said bankrupt, and setting forth in his said complaint all the matters, things and issues sought to be determined by the Referee in these proceedings and praying for an accounting between the petitioner and said bankrupt in respect to the matters and things considered and attempted to be determined by the Referee in these proceedings, and in which said action this petitioner joined issue by filing his demurrer and answer, and that said restraining order was denied after due proceedings had thereon, vacated and dissolved and thereupon the said Trustee did on Nov. 18, 1919, move the Court to dismiss the said action, and said litigation was determined in favor of this petitioner and judgment thereon has become final.
[14]

21.

That this petitioner excepts to all the acts and doings of the said Referee therein, in this regard, for the reasons hereinbefore set forth.

22.

That your petitioner demands that these proceedings be referred to the United States District Court for the District of Arizona for review.

WHEREFORE your petitioner prays this Honorable Court that all the proceedings of the Referee herein be declared void and that your petitioner go hence without delay.

DAVID BENSHIMOL,
Attorney for Petitioner. [15]

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Earl N. McKinney, Bankrupt. Petition for Revision.

Receipt of a copy of the enclosed petition for revision is hereby acknowledged this 30th day of September, 1922.

C. O. MONATT,
Atty. for Defendant in Error.

[Endorsed]: No. 3933. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Earl N. McKinney, Bankrupt. William Cowan, Petitioner, vs. John P. Cull, as Trustee in Bankruptcy of the Estate of Earl N. McKinney, Bankrupt, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Arizona.

Filed October 16, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of EARL N. McKINNEY, Bankrupt.
WILLIAM COWAN,

Appellant and Petitioner,

vs.

JOHN P. CULL, as Trustee in Bankruptcy in the
Matter of EARL N. McKINNEY, Bankrupt,
Appellee and Respondent.

JOSEPH F. SEYMOUR, of El Centro, *Amicus*
Curiae, Counsel for the Bankrupt by
Permission of the Court granted
May 8, 1923.

BRIEF AND ARGUMENT OF BANKRUPT.

JOSEPH F. SEYMOUR,
Attorney for the Bankrupt,
by Permission of the Court.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of EARL N. McKINNEY, Bankrupt.

WILLIAM COWAN,

Appellant and Petitioner,

vs.

JOHN P. CULL, as Trustee in Bankruptcy in the Matter of EARL N. McKINNEY, Bankrupt,

Appellee and Respondent.

JOSEPH F. SEYMOUR, of El Centro, *Amicus Curiae*, Counsel for the Bankrupt by Permission of the Court granted May 8, 1923.

Brief and Argument of Bankrupt.

The court has before it the Transcript of Record and the Briefs of the Appellant and Respondent.

Now comes the Bankrupt, Earl N. McKinney, by and through his attorney, Joseph F. Seymour, and makes this presentment to this Honorable Court, permission having been first obtained so to do in open court on May 8, 1923.

On page 9 of Appellant and Petitioner's Brief we find the following:

The Court, In re Wood, 278 Fed. 355, says:

"It is within the power of the bankruptcy court to assert and exercise a summary power over the property of a bankrupt or even of third persons holding property and claiming title, *provided* such claim is merely colorable or fraudulent. But inasmuch as such proceedings deprives a person of the usual due process of law, a summary order directing its surrender should be based upon facts which no fair mind can dispute."

On page 38 of Transcript of Record, in the special report of the Trustee, we find the following:

"That it looks to the Trustee that much of the property taken over by Cowan is not covered by any existent mortgage, as much of the personal property had been sold and changed by mortgagor after the execution of the mortgages as testified by bankrupt, and from all that the trustee can gather that Cowan is in possession of all this property without authority of law, *and has converted the same to his own use unlawfully*, and that a considerable sum ought to be recovered from Cowan on an accounting, for the benefit of the general unsecured creditors, and the trustee recommends that an action be instituted against said Cowan for an accounting in the Superior Court of Cochise County, Arizona."

On page 45 of the Transcript of Record, in the special report of Trustee, we find the following:

“That under said judgment so obtained by collusion and misunderstanding by and between Cowan and McKinney in this respect that McKinney at no time in the transaction knew what his legal rights were as a mortgagor, and was led to believe by Cowan and his attorney that Cowan as mortgagee could at any time and at his option take over all the property claimed under the mortgages and thereby induced McKinney to turn over the bankrupt’s property to Cowan on the 1st day of November, 1917, with the agreement that McKinney was to run the business and as soon as Cowan received sufficient from the business to liquidate his claims then the property was to be turned back to McKinney, and during the time McKinney was running the business, he was to receive a salary, and under which arrangement McKinney did give his time and work aided by his experience, to the business from Novr. 1st, 1917, to April 1st, 1918, five months, and during said time all the proceeds were turned to Cowan, and McKinney received little or nothing for his work, and in the meantime this suit was started against McKinney and the latter without legal advice, and in collusion with Cowan and his attorney induced McKinney to make the confession and agreements (page 4) for the judgment as was finally entered in the said case of

Cowan vs. McKinney, and therefore *I allege and charge that such judgment was fraudulent as to the general creditors.*”

On pages 29, 30 of the Transcript of Record, testimony of the bankrupt, we find the following:

“I turned in all money from the business to Benshimol and he was to pay all bills. No account was ever rendered to me but I understood the ranch account was carried in the name of William Cowan, mortgagee, by David Benshimol, attorney, (20) and the moneys collected deposited in the First National Bank of Douglas, Arizona. The average monthly receipts of the business at the time I turned it over to Cowan was from twelve to fifteen hundred dollars a month. The expenses ran about the same.

When I turned over all my property to Cowan in November, 1917, the cattle were not counted, but at that time I had between two hundred and two hundred and fifty head of cattle. About one hundred milk cows, and about one hundred and fifty range cattle.

I never gave a bill of sale for anything. Cowan said the property was all his and I supposed it was. He had a mortgage over everything. He offered to cancel everything but never did. I never gave him a bill of sale or deed for the property.”

On page 31 of the Transcript of Record, testimony of the bankrupt, we find the following:

“As to my financial affairs, I will state that I wanted to go into bankruptcy before I turned over my property to Cowan but neither Cowan nor Benshimol would consent to it and Cowan left it to Benshimol to take care of my creditors. They began to get rid of me the last of March, 1918, when Kirkland was sent out to the ranch.”

On page 33 of Transcript of Record, testimony of the bankrupt, we find the following:

“I wanted to take bankruptcy proceedings in November, 1917, as I have testified, but both Cowan and Benshimol insisted that I should not go into bankruptcy. Benshimol said I must (23) wait until after the four months had expired. I do not know why but I understand Cowan would then get everything. Cowan never asked me for a bill of sale or deed. I thought he had a right to take everything under his mortgages. Cowan knew I had other creditors, and talked about them on numerous occasions. He said he did not care what became of my other creditors. Benshimol during all this time was Cowan’s attorney, he was not mine. He claimed to be working for Cowan.”

On pages 84, 85 of Transcript of Record, referee’s findings of fact and conclusions of law, we find the following:

“That the Trustee has charged that Cowan failed to give credit to the bankrupt, for checks

sent him on sales of cattle made by the bankrupt, and failed to give credit to the bankrupt for different properties taken over by Cowan, and so under said charges and allegations of the Trustee I on or about the 12th day of Dec., 1919, had Cowan subpoenaed to appear before me on December 22d, 1919, at Douglas, Arizona, for examination, where he, Cowan, appeared and submitted to examination by myself and from such examination I found that during the year 1916 the bankrupt had sold stock presumably covered by Cowan's mortgages in the sum of \$2,424.50, which the Bankrupt Cowan admitted had turned over to him said amount of \$2,424.50 from such sales of stock and in an examination of Cowan he could only show where he had credited the bankrupt with the sum of \$1158.92, leaving a balance unaccounted for which Cowan admitted he had received of \$1265.58."

As appears from the files and records in this case the Appellant and Petitioner, Cowan has used every means possible to further his claim. We find the Trustee and Referee disagreeing with him. We find him appealing from the decision to the District Court of the United States for the District of Arizona. We find that Court disagreeing with Mr. Cowan and agreeing in the findings of fact and conclusions of law made by the Referee, affirmed. We find the opinion of this Honorable Court just referred to, as set forth in the minutes of said court.

On pages 175, 176 of the Transcript of Record we find the following:

“May, 1922, Term—Tuesday, September 6, 1922.—
Tucson.

In the District Court of the United States for the
District of Arizona.

Honorable WILLIAM H. SAWTELLE, United
States District Judge, Presiding.

Minute Entry.

B—31.

In the Matter of EARL N. McKINNEY, Bank-
rupt.

Minutes of Court—September 5, 1922.

ORDER AFFIRMING REFEREE'S FIND-
INGS OF FACT AND CONCLUSIONS OF
LAW.

The petition of William Cowan, filed herein July 19, 1921, having submitted to the Court, and by the Court taken under advisement, and the Court, having fully considered the same, does now order that the petitioner's motion to dismiss for want of jurisdiction in the Referee or this Court be, and the same is, hereby overruled, the Court being of the opinion that the Referee was within his rights and proceeded lawfully in instituting summary proceedings referred to in the *the* said petition, and that it was not necessary that the matters and things referred to in said petition be determined in a plenary action;

IT IS THEREORE ORDERED, ADJUDGED AND DECREED that the findings of fact and conclusions of law made by the Referee be, and the same are, hereby affirmed.

IT IS FURTHER ORDERED that the Clerk send papers and records in this case back to the Referee for further proceedings in accordance with this decision. (132)"

We are now presented with the appeal and petition in this Court.

As to the jurisdiction of the bankruptcy court to adjudicate in a summary proceeding, we find in *Re Ellis Bros. Printing Co.*, 156 Federal, 430, the Court holding in substance as follows:

"The claim of an attorney who as such collected money for a bankrupt before the bankruptcy of the right to retain such money and to apply it on an indebtedness from the bankrupt to him, is not *not* such an adverse claim of title as to deprive the bankruptcy court of jurisdiction to adjudicate such claim in a summary proceeding, therefore, by the trustee."

We cite, also, *In re Howard Laundry Co.*, 203 Federal, 445. *Bryan vs. Beranheimer*, 181 U. S. 188.

We find the Court holding in *Re Friedman*, 161 Federal, 260: The District Court had jurisdiction in a bankruptcy proceeding to make a summary order directing third persons to pay over to the temporary receiver sums of money which they claimed they did not have or which they claimed were their own property.

The bankrupt has no complaint to make of either the Trustee, the Referee, or their Attorney. He simply seeks to draw to the Court's attention in his humble way a few facts as evidenced by the record and a few cases in support of the Trustee's position and in opposition to the Appellants. Time prevents a more elaborate and extensive discussion. That the holding of the Court that the summary action followed was proper is, in our opinion, ably supported by the authorities and was correct. That the conduct of Mr. Cowan cannot be approved is absolutely supported by the record in this case.

Respectfully submitted,

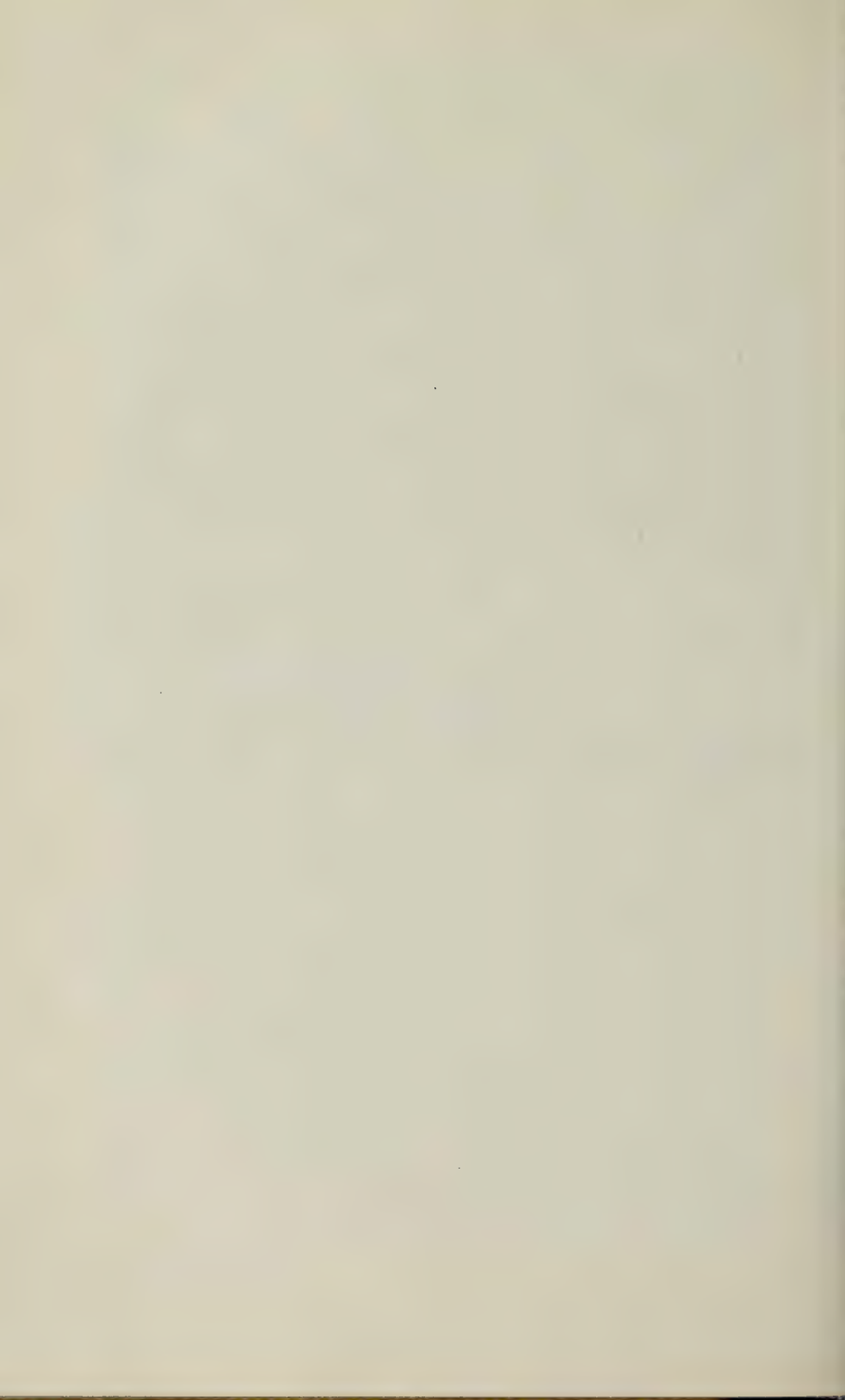
EARL N. McKINNEY,

Bankrupt.

By JOSEPH F. SEYMOUR,

Of El Centro, California,

Attorney for the Bankrupt, by Permission of the Court.



United States
Circuit Court of Appeals

For the Ninth Circuit.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
TOOLS AND ACCESSORIES, and
HARVEY NOBLE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Montana.

FILED

NOV 21 1922

F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
TOOLS AND ACCESSORIES, and
HARVEY NOBLE,

Plaintiffs in Error,

vs.

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Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. FREEMAN, THELEN & FRARY, of
Great Falls, Montana,

Attorneys for Intervenor and Plaintiff in
Error.

JOHN L. SLATTERY, Esq., United States At-
torney, RONALD HIGGINS, Esq., Assistant
U. S. Attorney, W. H. MEIGS, Esq., Assistant
United States Attorney, all of Helena, Mon-
tana,

Attorneys for Libelant and Defendant in
Error. [1*]

In the District Court of the United States in and
for the District of Montana.

No. 965.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
etc., and HARVEY NOBLE,

Libelees;

CHARLES ZUCKERMAN,

Intervenor.

BE IT REMEMBERED, that on November 26,
1921, a libel of information was filed herein, which
is in the words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified
Transcript of Record.

In the District Court of the United States, District
of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,

One Motor Meter, Two Jacks, Two Hammers,
Three Pliers, One Rim Wrench, One Tool
Kit, Two Chains, Four Wrenches, One Oil
Gun, One Wheel Puller, One Five-gallon
Gasoline Can, One Set Side Curtains, One
Screw-driver, One Chisel, Two Spare Tires,
One Rim Lug, and HARVEY NOBLE,

Libelees.

Libel of Information.

BE IT REMEMBERED, that John L. Slattery,
United States Attorney for the District of Mon-
tana, who, for the United States, in its behalf
prosecutes, comes here in person into the District
Court of the United States for the District of Mon-
tana, and informs the Court and gives it to under-
stand:

That the United States of America brings suit
against that certain conveyance, to wit, One Big
Six Studebaker Automobile, Model 1919, Serial No.
295019, Engine No. C. F. 2933, Montana State
License No. 19521, and one motor meter, two jacks,
two hammers, three pliers, one rim wrench, one tool
kit, two chains, four wrenches, one oil gun, one

wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, one rim lug, hereinafter mentioned as tools and accessories, which said automobile and said tools and accessories are now in the hands of O. H. P. Shelley, Supervising Federal Prohibition Director, and an officer of the United States, at Great Falls, in the State and District of Montana, having been seized by Bob Gordon, Sheriff of Cascade County, at Great Falls, in said State and District of Montana, and which said conveyance and said tools and accessories the said Bob Gordon did on the 8th day of October, 1921, seize and secure as liable to seizure and forfeiture under the provisions of the Internal Revenue Laws of the United States, [3] said conveyance being then and there used in the removal of goods and commodities, to wit, distilled spirits, in respect whereof a tax is imposed by law, and which said tax was then and had theretofore been imposed by law, and was due and owing to the United States, and had not been paid, with the intent to defraud the United States of such tax.

That the United States Attorney alleges and particularly propounds as grounds and cause for said forfeiture:

1. On or about the 8th day of October, 1921, at a point about fifteen miles north of the city of Great Falls, in the State and District of Montana, Harvey Noble, did then and there wrongfully and unlawfully remove, and was concerned in removing, by means of One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No.

4 *One Big Six Studebaker Automobile, etc., et al.,*

C. F. 2933, Montana State License No. 19521, a quantity of distilled spirits, the exact quantity and character of which is to the libelant unknown, on which said distilled spirits a tax was and had theretofore been imposed by law, to wit, the Internal Revenue tax on distilled spirits, and which said tax had not been paid, and was then and there due and owing and unpaid to the United States of America, then and there intending to defraud the said United States of the said tax on the said distilled spirits, so removed as last aforesaid.

2. That the said Harvey Noble claims some right, title or interest in and to the said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, used in the removal of the said distilled spirits, and which contained said distilled spirits, and to said tools and accessories, and to said goods and commodities, the exact quantity and character of which is to the libelant unknown.

3. That said conveyance, to wit, One Big Six Studebaker Automobile Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, was seized on the 8th day of October, 1921, as liable to seizure and forfeiture under the provisions of the Internal Revenue Laws of the United States, by Bob Gordon, Sheriff of Cascade County, in said State and District of Montana, for the reason that the said conveyance had been, and then was being, used in the unlawful [4] removal of distilled spirits aforesaid.

4. That said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and said tools and accessories, are now subject to seizure.

WHEREFORE, the said United States Attorney for the District of Montana, who prosecutes as aforesaid for the United States, prays that due process of law may be awarded in this behalf, to enforce the forfeiture of the said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and said tools and accessories, so seized as aforesaid, and to give notice to all persons concerned to appear on the return date of said process, to show cause, if any they have, why said forfeiture should not be adjudged.

JOHN L. SLATTERY,
United States Attorney, District of Montana. [5]
United States of America,
District of Montana,—ss.

John L. Slattery, being first duly sworn, on oath, deposes and says:

That he is the duly appointed, qualified and acting United States Attorney, for the District of Montana, and as such makes this verification to the foregoing libel of information; that he knows the contents thereof, and the same is true to the best of his knowledge, information and belief.

JOHN L. SLATTERY.

6 *One Big Six Studebaker Automobile, etc., et al.,*

Subscribed and sworn to before me this 25th day of November, 1921.

[Seal] L. R. POLGLASE,
Deputy Clerk, United States District Court, District of Montana.

Filed Nov. 26, 1921. C. R. Garlow, Clerk. [6]

Thereafter, on November 26, 1921, an order was duly made and entered herein in the words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,

One Motor Meter, Two Jacks, Two Hammers, Three Pliers, One Rim Wrench, One Tool Kit, Two Chains, Four Wrenches, One Oil Gun, One Wheel Puller, One Five-gallon Gasoline Can, One Set Side Curtains, One Screw-driver, One Chisel, Two Spare Tires, One Rim Lug, and HARVEY NOBLE,

Libelees.

Order for Issuance of Process.

A libel of information having been filed in the above-entitled court in the above-entitled cause, on the 26th day of November, 1921, and being fully advised of the law and the facts, and it

appearing therefrom to be a proper cause, now, therefore,

It is hereby considered and ordered by the Court:

I.

That process in due form of law issue against the property described in said libel of information, and that all persons interested in said described property and the libelees be cited to file answer to said libel of information, setting forth their interest in or claim to said property libelled, if any they have, with the Clerk of this Court, in the City of Great Falls, in the State and District of Montana, on or before the 20th day of December, 1921, which said day is hereby fixed as the return day thereof.

II.

That notice hereof be given to all persons interested in said property, by causing the substance of said libel, with the order of [7] Court setting the time and place appointed in which to file answer to said libel, and the place appointed for the trial and hearing of said libel of information be published in the "Great Falls Tribune," a newspaper of general circulation published at Great Falls, in the State and District of Montana, and near the place where said property was seized, and by posting the same in three public places in the City of Great Falls, in the State and District of Montana, for the period of fourteen (14) days prior to the time set for said return day.

8 *One Big Six Studebaker Automobile, etc., et al.,*

Dated this 26th day of November, 1921.

BOURQUIN,

Judge.

Filed Nov. 26, 1921. C. R. Garlow, Clerk. [8]

Thereafter, on Nov. 26, 1921, a warrant of arrest and monition was duly issued herein, which with the Marshal's return thereon is in the words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,

One Motor Meter, Two Jacks, Two Hammers,
Three Pliers, One Rim Wrench, One Tool
Kit, Two Chains, Four Wrenches, One Oil
Gun, One Wheel Puller, One Five-gallon
Gasoline Can, One Set Side Curtains, One
Screw-driver, One Chisel, Two Spare Tires,
One Rim Lug, and HARVEY NOBLE,

Libelees.

Warrant of Arrest and Monition.

The President of the United States of America, to the Marshal of said United States, District of Montana, GREETING:

WHEREAS, a libel of information has been filed in the District Court of the United States for

the District of Montana, on the 26th day of November, 1921, by the United States of America, against one Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and one motor meter, two jacks, two hammers, three pliers, one rim wrench, one tool kit, two chains, four wrenches, one oil gun, one wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, one rim lug, hereinafter mentioned as tools and accessories are now in the possession and custody of O. H. P. Shelley, Supervising Federal Prohibition Director, and an officer of the United States, in the State and District of Montana, claimed as forfeited to the United States, in that, the said Studebaker Big Six Automobile was used in the removal of a [9] quantity of whiskey, the exact quantity of which is to the libelant unknown, and for the disposition and concealment thereof, with intent to defraud the United States of the tax imposed under the Internal Revenue Laws of the United States upon said whiskey, praying the issuance of process in due form of law in that behalf made, and that all persons interested in said Big Six Studebaker Automobile, or other property hereinbefore described, be cited in general and special to answer the premises and all proceedings being had with the said Big Six Studebaker Automobile, or other property, for the causes of said libel mentioned, be condemned and forfeited to the United States.

You are, therefore, hereby commanded to arrest and attach the aforesaid Big Six Studebaker Automobile, and other property hereinbefore described, and to hold the same in your custody until the further order of this Court respecting the same, and to give due notice of such seizure to said Harvey Noble, claimant herein, and all other persons claiming the same or knowing or having anything to say why the aforesaid Big Six Studebaker Automobile, and other property, should not be condemned and forfeited, pursuant to the prayer of the said libelant, and that they be cited to file answer to said libel of information, setting forth their interest in or claim to said property libeled, if any they have, with the Clerk of Court, in the City of Great Falls, in the State and District of Montana, on or before the 20th day of December, 1921, by causing the substance of such libel and order to be published in the "Great Falls Tribune," a newspaper of general circulation published at Great Falls, in the State and District of Montana, and near the place of seizure, and by posting up the same in three of the most public places in Great Falls, in the State and District of Montana, for the space of fourteen (14) days, and what you shall have done in the premises do you then make return thereon, together with this writ.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of said Court at the City of Butte, in

the State and District of Montana, this [10] 26th day of November, 1921.

[Seal]

C. R. GARLOW,

Clerk of the United States District Court, District of Montana.

By L. R. Polglase,
Deputy.

Filed December 29, 1921. C. R. Garlow, Clerk.
[11]

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
One Motor Meter, Two Jacks, Two Hammers,
Three Pliers, One Rim Wrench, One Tool Kit,
Two Chains, Four Wrenches, One Oil Gun, One
Wheel Puller, One Five-gallon Gasoline Can,
One Set Side Curtains, One Screw-driver, One
Chisel, Two Spare Tires, One Rim Lug, and
HARVEY NOBLE,

Libelees.

**Notice of Seizure and Time and Place of Trial
and Hearing.**

To Harvey Noble, and All Others Whom It may
Concern:

Notice is hereby given that a libel of information
was filed in the above-entitled court in the above-

entitled cause, on the 26th day of November, 1921, wherein and whereby it is sought to have certain property described as follows, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and one motor meter, two jacks, two hammers, three pliers, one rim wrench, one tool kit, two chains, four wrenches, one oil gun, one wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, one rim lug, hereinafter mentioned as tools and accessories, seized on the 8th day of October, 1921, at a point about fifteen miles north of the City of Great Falls, in the State and District of Montana, by Bob Gordon, Sheriff of Cascade [12] County, and an officer of the law, at Great Falls, in said State and District of Montana, and heretofore attached and arrested and held and seized, and now in possession of O. H. P. Shelley, Supervising Federal Prohibition Director, in said State and District of Montana, forfeited for the following reasons, to wit:

1. On or about the 8th day of October, 1921, at a point about fifteen miles north of the City of Great Falls, in the State and District of Montana, Harvey Noble did then and there wrongfully and unlawfully remove, and was concerned in removing, by means of One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, a quantity of distilled spirits, the exact quantity of which is to the libelant unknown, on which said distilled

spirits a tax was and had theretofore been imposed by law, to wit, the Internal Revenue Tax on distilled spirits, and which said tax had not been paid, and was then and there due, owing and unpaid to the United States of America, he, the said Harvey Noble, then and there intending to defraud the said United States of the said tax on the said distilled spirits, so removed as last aforesaid.

2. That the said Harvey Noble claims some right, title or interest in and to the said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, used in the removal of the said distilled spirits, and which contained said distilled spirits, and to said tools and accessories, and to said goods and commodities, the exact quantity and character of which is to the libelant unknown.

3. That said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, was seized on the 8th day of October, 1921, as liable to seizure and forfeiture under the provisions of the Internal Revenue Laws of the United States, by Bob Gordon, Sheriff of Cascade County, in said State and District of Montana, for the reason that the said conveyance had been, and then was being, used in the unlawful removal of distilled spirits [13] aforesaid.

4. That said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State Li-

14 *One Big Six Studebaker Automobile, etc., et al.*,
cense No. 19521, and said tools and accessories, are
now subject to seizure.

That by order of the Court said libel of information has been set for trial and hearing before the above-entitled court at the courtroom thereof, in the City of Great Falls, in the State and District of Montana, and all persons interested in said described property and the libelees be cited to file answer to said libel of information, setting forth their interest in or claim to said property libelled, if any they have, with the Clerk of this court, in the City of Great Falls, in the State and District of Montana, on or before the 20th day of December, 1921, which said day is hereby fixed as the return day thereof.

Dated this 26th day of November, 1921.

JOSEPH L. ASBRIDGE,
United States Marshal for the District of Montana.

[14]

PUBLISHER'S AFFIDAVIT.

State of Montana,
County of Cascade,—ss.

Before me, the undersigned, a notary public, this day personally came Leonard G. Diehl, who, being first duly sworn, according to law, says that he is the business manager of "The Tribune," a daily newspaper published at Great Falls, Montana, in said county and State, and that the publication, of which the annexed is a true copy, was published in said paper on the 2d day of December, 1921, and that the rate charged therefor is not in excess of

the commercial rates charged private individuals, with the usual discounts.

LEONARD G. DIEHL.

Subscribed and sworn to before me this 27th day of December, 1921.

[Seal]

H. R. AYER,

Notary Public for the State of Montana, Residing at Great Falls, Montana.

My commission expires Oct. 6, 1923.

(Copy foregoing Notice Attached.) [15]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
etc., and HARVEY NOBLE,

Libelees.

**Marshal's Return to Warrant of Arrest and
Monition.**

I hereby certify and return that I received the within warrant of arrest and monition at Helena, Montana, December 2, 1921, and executed the same by arresting the therein described automobile at Helena, Montana, on the said 2d day of December, 1921, by taking the said automobile into custody and appointing Mr. R. C. Huffman, proprietor of the Central Garage, Helena, Montana, custodian of said car and leaving a copy of said warrant and monition with said Mr. Huffman; that I caused

16 *One Big Six Studebaker Automobile, etc., et al.,*
to be published in the "Great Falls Tribune," a
newspaper of general circulation published daily
at Great Falls, Montana, Notice of Seizure and
Time and Place of Trial and Hearing, a copy of
which notice aforesaid is hereto attached and made
a part of this return; that I also caused to be posted
at three public and conspicuous places at Great
Falls, Montana, copies of said notice.

Dated December 28, 1921.

JOSEPH L. ASBRIDGE,

United States Marshal.

By N. E. Baynham,

Deputy.

Filed Dec. 29, 1921. C. R. Garlow, Clerk. [16]

Thereafter, on December 21, 1921, a petition to
intervene was filed herein by Charles Zuckerman,
which is in the words and figures following, to wit:
In the District Court of the United States, in and
for the District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
One Motor Meter, Two Jacks, Two Hammers,
Three Pliers, One Rim Wrench, One Tool Kit,
Two Chains, Four Wrenches, One Oil Gun,
One Wheel Puller, One Five-gallon Gasoline

Can, One Set Side Curtains, One Screw Driver,
One Chisel, Two Spare Tires, One Rim Lug,
and HARVEY NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

Petition in Intervention.

To the Honorable GEO. M. BOURQUIN, Judge of
the District Court of the United States for the
District of Montana:

Comes now Chas. Zuckerman, and shows to this
Honorable Court as follows:

FIRST.

That the above-entitled action is now pending in
the above-entitled court for the forfeiture of One
Big Six Studebaker automobile, Model 1919, serial
No. 295019, Engine No. C. F. 2933, and the tools
and accessories in connection with the said libel of
information, having been filed in the above-entitled
court, and has not as yet proceeded to judgment.

SECOND.

That your petitioner has a lien upon said car on
account of a certain chattel mortgage made and
given by one Harvey Noble to your petitioner, and
which said chattel mortgage has been filed in the
[17] office of the County Clerk and Recorder of
Cascade County, Montana. That by reason of the
failure of the said Harvey Noble to perform the
conditions set forth in said chattel mortgage or
make the payment provided for therein, that your

petitioner is entitled to the possession of the said automobile.

THIRD.

That the claims of the United States of America and libelant in this action, are made adversely to petitioner's title and right of possession, and petitioner desires to litigate the question directly with said libelant.

WHEREFORE, petitioner prays that he be allowed to come in as a party defendant in this action, and that he be permitted to file his answer to the said libel of information.

CHARLES ZUCKERMAN.

State of Montana,
County of Cascade,—ss.

Charles Zuckerman, being first duly sworn on oath deposes and says, that he is the petitioner and defendant in the above-entitled action; that he has heard read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to those matters and things therein alleged, upon information and belief, and as to those he believes them to be true.

Subscribed and sworn to before me this 20th day of Dec. 1921.

[Seal]

JOHN N. THELEN,
Notary Public, for the State of Montana, Residing
at Great Falls, Montana.

My commission expires Sept. 13, 1922.

Service of the within petition in intervention together with copy thereof is hereby admitted this 20th day of December, 1921.

W. H. MEIGS,
Asst. U. S. Atty.

Filed December 21, 1921. C. R. Garlow, Clerk.
[18]

Thereafter, on December 21, 1921, answer of intervenor was filed herein, in the words and figures following, to wit:

In the District Court of the United States, in and
for the District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
One Motor Meter, Two Jacks, Two Hammers,
Three Pliers, One Rim Wrench, One Tool Kit,
Two Chains, Four Wrenches, One Oil Gun, One
Wheel Puller, One Five-Gallon Gasoline Can,
One Set Side Curtains, One Screw-driver, One
Chisel, Two Spare Tires, One Rim Lug, and
HARVEY NOBLE,

Libelee,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

Answer of Defendant and Intervenor.

Comes now Chas. Zuckerman, after leave of Court

first had and obtained, and file this, his answer to the libel of information, and admits, alleges and denies as follows:

FIRST.

Answering paragraph one (1) this answering defendant denies each and every matter, allegation and thing contained and set forth therein.

SECOND.

Answering paragraphs two (2), three (3), and four (4), of said libel of information, this answering defendant alleges that he does not have sufficient knowledge to form a belief, and therefore denies the same.

THIRD.

Further answering said libel of information, this defendant denies each and every other matter, allegation and thing contained and set forth therein, and heretofore expressly admitted, modified or denied. [19]

II.

Further answering said libel of information, and as his first, separate and further defense to the same, this answering defendant admits, alleges and denies as follows:

FIRST.

That under date of Sept. 22, 1921, this answering defendant sold the said Studebaker automobile, Serial No. 295019 and Engine No. C. F. 2933, together with the equipment and tools used in connection therewith, and being the same automobile mentioned and described in the libel of information to one Harvey Noble, and at the time

of said sale, took from said Harvey Noble a chattel mortgage upon the said car and equipment and tools to secure the balance of the purchase money, and which said chattel mortgage was duly filed in the office of the County Clerk and Recorder of Cascade County, Montana, on the 28th day of September, 1921.

SECOND.

That this defendant is still the owner and holder of the aforesaid mentioned chattel mortgage, and promissory note secured thereby, and the amount due on said promissory note has not been paid to this defendant by the said Harvey Noble, or by anyone in behalf of the said Harvey Noble, and that under and by virtue of the terms and conditions of the said chattel mortgage, and by reason of the failure of the said Harvey Noble to perform the conditions of the said chattel mortgage, and make the payments provided for therein, this defendant is entitled to the possession of the said automobile.

THIRD.

That defendant further alleges that the said automobile was not used to convey or remove, and also not concerned in the removal of the distilled spirits, to wit, distilled spirits in respect whereof, as tax was imposed by the internal revenue laws of the United States of America, and which said tax the said Harvey Noble, libelee, was then and there intending to defraud the United States of America of the payment thereof, and defendant further alleges that there was no distilled spirits or liquors upon

which the tax was not paid, being covered by the said car at the time the same was seized. [20]

FOURTH.

Defendant further alleges that the said automobile was not being used to convey distilled spirits or liquors upon which a tax was not paid, and further alleges that the said automobile was not engaged in the transportation or conveyance of any distilled spirits at all.

FIFTH.

This defendant further alleges upon information and belief that any taxes to the United States of America upon any distilled spirits if there were any distilled spirits, in the said car, as set forth in said libel of information, having been fully paid to the said United States of America, long prior to the 8th day of October, 1921, and defendant further alleges that the said car is wrongfully and unlawfully seized and withheld, without cause or reason therefor.

WHEREFORE, being fully answered, this defendant prays that the libel do not have the relief as prayed for in the said libel of information, and that this answering defendant be decreed the owner of the said Studebaker automobile aforesaid, and entitled to the possession thereof.

FREEMAN, THELEN & FRARY.

Attorneys for Answering Defendant and Intervenor. [21]

State of Montana,
County of Cascade,—ss.

Charles Zuckerman, being first duly sworn, on oath deposes and says: That he is the defendant and intervenor in the above-entitled action: That he has heard read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge except as to those matters and things therein alleged, upon information and belief, and as to those he believes them to be true.

CHARLES ZUCKERMAN.

Subscribed and sworn to before me this 20th day of December, 1921.

[Seal] JOHN N. THELEN,
Notary Public for the State of Montana, Residing
at Great Falls, Montana.

My commission expires Sept. 13, 1922.

Service of copy of the within answer admitted this 20th day of December, 1921, together with copy.

W. H. MEIGS,
Asst. U. S. Atty.

Filed December 21, 1921. C. R. Garlow, Clerk.
[22]

Thereafter, on March 14, 1922, supplemental answer of defendant and intervenor was duly filed herein, in the words and figures following to wit:

In the District Court of the United States in and
for the District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,

One Motor Meter, Two Jacks, Two Hammers,
Three Pliers, One Rim Wrench, One Tool
Kit, Two Chains, Four Wrenches, One Oil
Gun, One Wheel Puller, One Five-gallon
Gasoline Can, One Set Side Curtains, One
Screw-driver, One Chisel, Two Spare Tires,
One Rim Lug, and HARVEY NOBLE,

Libelee,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

**Supplemental Answer of Defendant and Inter-
venor.**

Now comes Charles Zuckerman, defendant and intervenor, and files this, his supplemental answer to the libel of information, and admits, alleges and denies as follows:

FIRST.

Answering paragraph One (1) this answering

defendant denies each and every allegation, matter and thing contained and set forth therein.

SECOND.

Answering paragraphs Two (2), Three (3) and Four (4), of said libel of information, this answering defendant alleges that he does not have sufficient knowledge or information to form a belief, and therefore denies the same.

THIRD.

Further answering said libel of information, this defendant denies each and every allegation, matter and thing contained and set [23] forth in said libel of information save and except as the same is hereinafter or heretofore specifically admitted, modified or denied.

II.

Further answering said libel of information, and as his first, separate and further defense to the same, this answering defendant, admits, alleges and denies as follows:

FIRST.

That under date of September 22d, 1921, this answering defendant sold the said Studebaker automobile, Serial No. 295019 and Engine No. C. F. 2933, together with the equipment and tools used in connection therewith, and being the same automobile mentioned and described in the libel of information, to one Harvey Noble, and at the time of the said sale, took from the said Harvey Noble a chattel mortgage upon the said car and equipment and tools to secure the balance of the purchase money, and which said chattel mortgage was duly

filed in the office of the County Clerk and Recorder of Cascade County, Montana, on the 28th day of September, 1921.

SECOND.

That this defendant is still the owner and holder of the aforesaid mentioned chattel mortgage, and promissory note secured thereby, and the amount due on said promissory note has not been paid to this defendant by the said Harvey Noble, or by anyone in behalf of the said Harvey Noble, and that under and by virtue of the terms and conditions of the said chattel mortgage, and by reason of the failure of the said Harvey Noble to perform the conditions of the said chattel mortgage, and make the payments provided for therein, this defendant is entitled to the possession of the said automobile.

THIRD.

Defendant further alleges that the said automobile was not used to convey or remove, and was not concerned in the removal of distilled spirits, to wit: Distilled spirits in respect whereof, a tax was imposed by the Internal Revenue laws of the United States of America, and which said tax the said Harvey Noble, libelee was then and there intending to defraud the United States of America of the payment [24] thereof, and defendant further alleges that there were no distilled spirits or liquors upon which the tax was not paid, being conveyed by the said car at the time the same was seized, or at all.

FOURTH.

Defendant further alleges that the said auto-

mobile was not being used to convey distilled spirits or liquors upon which a tax was not paid, and further alleges that the said automobile was not engaged in the transportation or conveyance of any distilled spirits at all.

FIFTH.

This defendant further alleges upon information and belief that any taxes due the United States of America upon any distilled spirits, if there were any distilled spirits in the said car as set forth in the said libel of information, have been fully paid to the United States of America long prior to the 8th day of October, 1921, and defendant further alleges that the said car is wrongfully and unlawfully seized and withheld without cause or reason therefor.

III.

Further answering said libel of information, and as his second separate and further defense to the same, this answering defendant alleges as follows:

FIRST.

That the said automobile, being one Big Six Studebaker Automobile, and accessories mentioned as one of the defendants in this action, if the same automobile and accessories to which reference is made in a certain criminal action entitled the United States of America vs. Harvey Noble, and the Harvey Noble mentioned as one of the defendants in this action, is the same and identical Harvey Noble mentioned in a criminal action entitled the United States of America vs. Harvey Noble, which said criminal action was tried in the District Court

of the United States, Fourth District of Montana, at the March, 1922, term of the said Court, and that in the said criminal action the said Harvey Noble being one of the defendants in this action was charged by information with having wrongfully and unlawfully transported intoxicating liquors without then and there first obtaining the permit from the [25] Commissioner of Internal Revenue so to do, contrary to the form of the Statute in such case made and provided, and also that he wrongfully and unlawfully transported intoxicating liquors without making at the time a permanent record thereof, showing in detail the amount and kind of liquor transported together with the names and addresses of the consignee and consignor, and the time and place of such transportation, contrary to the form of the statute in such case made and provided, and that on the 8th day of October, 1921, the said Harvey Noble in the County of Cascade and in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor, intended for use, in violation of the National Prohibition Act, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America, which said information is hereto attached and made a part hereof, and reference thereto is hereby made.

SECOND.

That all of the violations of the Internal Revenue law set forth in the libel of information filed in

this action, or the intent to defraud the Government as is complained of in the libel of information, filed in this action, might have been established if said allegations be true, at the trial of the criminal action hereinbefore referred to herein, wherein the United States of America was plaintiff and Harvey Noble was defendant, and that all of the evidence which would be necessary to establish, and competent under the various assignments and charges of fraud set out in plaintiff's libel of information herein, would also be competent and would tend to establish the allegations of the said criminal information; that the various charges of fraud and causes of forfeiture alleged by the plaintiff herein, relate to the same subject matter and are based upon the same transaction as the various allegations in said criminal information contained, and that at the time when said criminal information was drawn by the attorney for the United States, and at the time it was considered by him, all of the facts which would be competent to sustain the allegations of plaintiff's libel of information, were known to, and in the possession of the representative of the United States. [26]

THIRD.

That the United States ought not now maintain its action herein for the penalty or for the relief demanded in the said libel of information, for at the March, 1922, term, in this court and district, a criminal information (the same above referred to), was found against the United States and in favor of the said Harvey Noble; that the counts in

the said criminal information contain practically the same charges, or are based upon the same charges in substance and effect, and are the same allegations of offenses and fraud and unlawful removal of intoxicating liquors as set forth in the libel of information in this action, and are founded upon the same transaction and the same facts, and under the same circumstances as the matters and things herein alleged in plaintiff's libel.

That all of the facts and circumstances, and all and singular of said matters at said term and in this court, were tried and inquired into and fully heard in said criminal action hereinabove referred to, and on the hearing thereof, the jury duly impaneled and sworn found this defendant not guilty, and the Court rendered a judgment acquitting this defendant of the charges set forth in said criminal information, hereto attached and made a part hereof and hereby referred to, and all of which constitutes the same removal of liquor or transportation of liquor, and facts and circumstances surrounding the same as are now set out by plaintiff herein, and herein answered by this defendant.

FOURTH.

That the automobile referred to in the criminal action, driven by the defendant, Harvey Noble, and made a defendant in this libel of information, is the same and identical car, and that the said Harvey Noble, defendant in this action, is the same and identical person as the Harvey Noble mentioned in the said criminal action heretofore referred to, and the said Harvey Noble is the same

and identical Harvey Noble referred to in this action, who is the owner of the said automobile, having purchased the same from this answering defendant, and having given a [27] chattel mortgage thereon to this defendant for the balance of the purchase price.

WHEREFORE, having fully answered this defendant prays that the libel do not have the relief as prayed for in the said libel of information; that the said action be dismissed and held for naught, and that this answering defendant be decreed entitled to the possession of the said automobile in question.

FREEMAN, THELEN & FRARY,
Attorneys for Defendant and Intervenor.

United States of America,
District of Montana,
County of Cascade,—ss.

Charles Zuckerman, being first duly sworn, on oath deposes and says: That he is the defendant and intervenor in the above-entitled action; that he has heard read the foregoing supplemental answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters and things therein alleged upon information and belief, and as to those he believes it to be true.

CHARLES ZUCKERMAN.

Subscribed and sworn to before me this 14th day of March, 1922.

[Seal]

JOHN N. THELEN,
Notary Public for the State of Montana, Residing
at Great Falls, Montana.

My commission expires Sept. 13, 1922. [28]

In the District Court of the United States, for
the District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARVEY NOBLE,

Defendant.

Information.

BE IT REMEMBERED, that W. H. Meigs, Assistant United States Attorney for the District of Montana, who for the said United States, in its behalf, prosecutes in his own person, comes here into the District Court of the United States for the District of Montana, on the 22d day of November, 1921, in the September, 1921, term of court, held at the City of Butte, in the State and District of Montana, and for the United States of America gives the court to understand and be informed.

That on or about the 8th day of October, 1921, one Harvey Noble, whose true name is to the informant unknown, in the County of Cascade, and in the County of Choteau, in the State and District of Montana, and within the jurisdiction of this

Court, did then and there wrongfully, and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the informant aforesaid further gives the court to understand and be informed:

That on or about the 8th day of October, 1921, said Harvey Noble, whose true name is to the informant unknown, in the County of Cascade, [29] and in the County of Choteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without making at the time a permanent record thereof, showing in detail the amount and kind of liquor transported, together with the names and addresses of the consignor and consignee, and the time and place of such transportation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the informant aforesaid further gives the court to understand and be informed:

That on or about the 8th day of October, 1921, said Harvey Noble, whose true name is to the infor-

mant unknown, in the County of Cascade, and in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor, intended for use in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

(Signed) W. H. MEIGS,
Assistant United States Attorney, District of
Montana. [30]

United States of America,
District of Montana,—ss.

W. H. Meigs, being first duly sworn, on oath deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; the said information being obtained from the transcript of proceedings held before W. S. Frary, a United States Commissioner for the District of Montana, and on file in this Court, and who, after due examination, found that there was probable cause to hold the defendant herein to bail.

(Signed) W. H. MEIGS.

Subscribed and sworn to before me this 22d day of November, 1921.

[Seal] (Signed) C. R. GARLOW,
Clerk U. S. District Court, District of Montana.
Service hereof admitted March 14, 1922.

JOHN L. SLATTERY,
Attorney for Libelant.

Filed March 14, 1922. C. R. Garlow, Clerk.
[31]

Thereafter, on March 15, 1922, said cause was duly tried and submitted to the Court, the record thereof being in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

No. 965.

UNITED STATES

vs.

ONE STUDEBAKER AUTO and HARVEY
NOBLE.

Trial.

This cause came on regularly for trial this day, Ronald Higgins, Esq., and W. H. Meigs, Esq., Assistant U. S. Attorneys, appearing for the United States, and J. N. Thelen, Esq., appearing for the libelees. Dudley Crowther, stenographer.

Thereupon counsel in open court waived jury trial. Thereupon counsel for libelees moved the

action be dismissed upon the ground the libel of information does not state facts sufficient to constitute a cause of action; that Sec. 3450, R. S. U. S., has been repealed by the National Prohibition Act, and that the Court is without jurisdiction of the cause; and further, that this action be dismissed upon the ground that the verdict and judgment of acquittal in the criminal action against the defendant Harvey Noble is a bar to this action, which motion was denied and exception noted.

Thereupon it was stipulated and agreed by counsel in open court, that this cause be submitted to the Court upon the evidence in the criminal action of United States vs. Harvey Noble with such additional proof as either side may desire to offer.

Thereupon Harry M. Dengler, O. H. P. Shelley, and J. J. O'Mahoney were sworn and examined as witnesses for the United States, whereupon the United States rested. Thereupon Charles Zuckerman was sworn and examined as a witness for libelees, a certain mortgage marked Exhibit "A" introduced, whereupon libelees rested. Thereupon the cause was argued, submitted to the court and taken under advisement, the parties being granted a few days to file briefs.

Entered in open court March 15, 1922.

C. R. GARLOW,

Clerk. [32]

Thereafter on May 25, 1922, the decision of the Court was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States in and
for the District of Montana.

No. 965.

UNITED STATES

vs.

ONE BIG SIX STUDEBAKER and NOBLE,
Libelees,

and

ZUCKERMAN, Intervenor.

Decision.

This is the usual libel invoking the forfeiture imposed by section 3450, R. S. (Comp. St., sec. 6352), for removal of distilled spirits with intent to defraud plaintiff of taxes thereon. Alleging Noble of some interest in the auto used it for the removal aforesaid, he is joined as libelee. The usual notice was published, and Noble made default. Zuckerman intervened, denying the user aforesaid, and alleging that Noble owns the auto, that intervenor owns a mortgage lien upon the auto and of date prior to the transactions or acts involved, and that in respect to the latter and in this court, Noble has been charged, tried and acquitted of transporting intoxicating liquor without the permit and record required by the National Prohibition Act and of

possessing such liquor with intent to use it in violation of said act.

Upon trial to the court, counsel stipulates that Noble has been charged, tried and acquitted as aforesaid, and that the evidence in that trial be submitted in evidence in this.

From that evidence it appears that the auto, transportation and liquors imputed to Noble in the former trial are those imputed to him in this, that in the former trial the plaintiff presented evidence tending to prove that Noble possessed and transported the liquor in circumstances of no permit had and no record made, and that Noble's defense in the former was not that he had a permit and made a record, but was that he neither possessed nor transported the [33] liquor. It is intervenor's contention that the verdict and judgment in the former trial necessarily determine that Noble neither possessed nor transported the liquor, that those issues are now *res judicata*, and that to retry them herein is to violate the rule of twice in jeopardy. In support he relies upon Coffey's Case, 116 U. S. 443, wherein Coffey's acquittal upon a trial for the crime denounced by sec. 3450 was held to bar proceedings against him and his property for the forfeiture consequent upon the crime. This is not that case. There, was identity in fact and law; here, is difference in both.

Noble might be not guilty of any or all of the offenses of the former trial and yet be guilty of the offense of the instant proceedings or *vice versa*.

The only fact conclusively proven in the former trial is that Noble was not guilty beyond reasonable doubt of any of the offenses therein charged. Hence, neither *res judicata* nor twice in jeopardy flows or accrues from said trial.

See Chantang Co. vs. Abaroa, 218 U. S. 481, 483.

Morgan vs. Davis, 237 U. S. 640.

U. S. vs. One Cole Auto, 273 Fed 936.

Furthermore, not only does Noble waive the plea, but it is not available to persons whose interest like intervenor's vests prior to the former suit to which they were not parties and out of which the plea might arise, for that they are not privy to the judgment and in consequence is no mutual estoppel

To revert to the evidence, at 1:00 A. M. Nov. 8, 1921, at a point twelve miles from Great Falls on the highway from said city to Canada, two deputy sheriffs in an auto traveling towards Canada met this auto driven by Noble whom they recognized, with him an unrecognized companion. Immediately following Noble was a Buick auto.

The officers passed both, promptly returned and repassed both, and about $\frac{1}{4}$ to $\frac{1}{2}$ mile ahead of the autos met the sheriff and another deputy in an auto, and the officers' cars stopped.

Thereupon Noble turned about and fled towards Canada, and the Buick turned off the road and across country. The sheriff with two of the deputies [34] pursued Noble, and the other deputy turned his car about and followed. Traveling 45 to 50 miles per hour, in 3 or 4 miles the sheriff

overhauled Noble, lapped him and called stop, whereupon Noble veered more into the road and before the sheriff, compelling the latter to fall behind. A deputy then tried and failed to puncture Noble's gas tank by revolver fire. In 4 or 5 more miles the sheriff again overhauled Noble, and within 10 or 12 feet of the latter's car the deputy succeeded in puncturing the tank, the gasoline escaping.

Then, testifies the sheriff and two deputies, sacks were thrown from Noble's car, the sheriff's car running over one of them.

The sheriff saw three sacks, one deputy, three, and the other deputy, five. At a preliminary hearing a few days after the incident the sheriff testified he saw three sacks thrown, and in the instant trial testified to seeing two, changing to three as most likely, upon his attention called to his previous testimony aforesaid, while the deputy now testifying to seeing three sacks, at said hearing testified to two.

Falling back to avoid firing the escaping gasoline, the sheriff lost sight of Noble's auto, passed on, turned out his lights, returned and saw it with lights out in a field near a farm house. A few minutes later the deputy following arrived and had two sacks of Canadian bottled whiskey and gin, one sack badly broken, found in the road. The sheriff then seized Noble's auto, Noble and his companion having disappeared. Two of the deputies returned over the road to Great Falls, and looking for more sacks but found none, probably because

of weeds along the road in connection with darkness. The sheriff remained in the vicinity, placing Noble's car across the road. About daylight the Buick in which were Stewart, Ernest and Prescott returned, the horn was blown, and followed by the sheriff they halted at Noble's car. Virtually in the sheriff's custody, in discussion with him Stewart and Ernest admitted they had a load of Canadian whiskey and gin in the Buick at the time of the chase which they had taken to and deposited in Great Falls. The sheriff doubtful of his ability to prove the facts, agreed to receive the liquors and [35] allow Stewart and Ernest to go with the Buick, Prescott stipulating that the arrangement would also "clean" him.

It appears Prescott was manager of a garage in Great Falls which was conducted by Noble, vice-president of the owning company, sometimes patronized by Stewart and Ernest. The latter escaping as aforesaid with the load of liquors went to the garage, and Prescott took them to his residence where the liquors were deposited in the basement.

Stewart and Ernest claimed they had but seven cases and delivered only that number to the sheriff, then disappearing with the Buick. A few days later Noble sought out the sheriff and with him discussed the status of the former's auto.

The sheriff delivered the auto to the Federal Agents, these proceedings were instituted Nov. 26, 1921, and hearing was had March —, 1922. The evidence further is that the sacks and liquors found in the road are like those delivered to the sheriff

by Stewart, Ernest and Prescott, that there was no permit for importation of the liquors, and no taxes for importation had been paid upon them, and that during the chase were some dust, wind, and tumbleweeds rolling.

In behalf of the intervenor the evidence is that Stewart and Noble in the Buick brought from Canada twenty-five cases of Canadian bottled whiskey and gin, in nineteen sacks, that twenty-five miles out of Great Falls their gasoline failed, that by a passing rancher they sent to Noble's garage a request for delivery to them five gallons of gasoline, that Noble took it to them in this auto, intervenor going along for the ride, that neither Noble nor intervenor had interest in or positive knowledge that the Buick was loaded with liquors, that none of the liquors were transferred to or were in Noble's auto, that intervenor has but one arm and no sacks were thrown from the auto, that when they fled from the officers they thought the latter were robbers or "highjackers," that Noble ran off the road thinking to secure protection at the farm house but found it vacant, that Noble and [36] intervenor arriving in Great Falls in the forenoon after the chase, Noble at the garage learned the pursuers were officers, and went home to bed and slept till next day, that three times he called at the court house to see the sheriff, finally one evening finding him at the jail, that intervenor made no complaint to the police of loss of the car, but learned from the police and papers the official character of the pursuers, that Prescott allowed the

liquors to be stored in his basement because the garage was a public place, that Stewart and Ernest were two sacks short, likely fallen out thru a defective door of the Buick, and Prescott went with them to look for the sacks because it was too early for breakfast or work, and for the ride.

That the two sacks of liquors later found by the deputy, were thrown from Noble's auto during the chase, is established by a preponderance of the evidence. Intervenor's contention that they had fallen from the Buick, and that what the officers saw were tumbleweeds blown across the road and accepted by them for sacks when the deputy appeared with sacks found upon the road of the chase, is untenable in view of all the circumstances. It is believed the officers saw what they testify they saw.

Everything persuades the flight and its strategy were with knowledge of the official character of the pursuers and to escape the consequences of guilty conduct. The pursued fled before the chase started. They were on the underground route for liquors, with liquors, and beyond doubt were anticipating to avoid vigilant officers, more likely to suddenly appear than "highjackers" or robbers.

If Noble had no liquor, he had no reason to fear "highjackers" and fear of robbers was unreasonable. These parties are not of fearsome nature. The demeanor and testimony of Noble and Stewart were bold, arrogant, flippant, verging upon the insolent and defiant.

The impression created is of untrustworthiness and discredibility. Stewart and Ernest had made many incriminating statements involving Noble.

Both subpoenaed by the government in Noble's trial, only Stewart [37] was called. Admitting the statements aforesaid, he jeeringly declared they were false and to deceive the officers, and with gross insolence and palpable falsehood sought to persuade that the officers had been in negotiations with him and Ernest for the officers' personal advantage in respect to the liquors and this auto.

Stewart thus treacherous, Ernest was called by Noble, and retracted his statements aforesaid, even as Stewart did. It is noted the statements of Stewart and Ernest incriminating Noble serve only to impeach their contrary statements at the trial, are not otherwise evidence herein.

It is significant they knew they were pursued by officers, that Stewart, Ernest and Prescott deposited the liquors in the latter's basement. If Noble was captured there was fear of search of the garage, and so the liquors were thus concealed. And the immediate return to the scene of the chase by these three was prompted not by search for two lost sacks or desire to ride, but to discover the fate of Noble and to serve him if practicable. If Noble had not known the officers, the natural thing would have been for him, if innocent, strong in the consciousness of it, to at once call up the Sheriff, to set both right, to recover his car.

But he did not. He first consulted counsel. Why? And only met the sheriff after some days

and without appointment or call but by personal journeys, he says, to find him. Intervenor's interest, his pretense of fear of robbers, for it is that, his failure to notify officers because "wasn't my car," and the impression created on the witness-stand, tend to restrain credit for his testimony. For the defense it is accepted, however, that Noble did deliver gasoline to Stewart and Ernest about 25 miles out of great Falls on the Canada high-road, whether or not the expedition to Canada was shared in by him.

That is where Noble received the sacks of liquors. He received them in circumstances of their character and origin, of men and methods, and of time and place that would apprise any intelligent person [38] they were being unlawfully imported, avoiding governmental knowledge, supervision and dues, and with intent to defraud Government of unpaid import taxes, internal and customs, to both of which the liquors are subject by law to the knowledge of all men. More reason had Noble to know these facts, and he did know them. In brief, Noble knew the liquors were in process of smuggling from Canada. Participating to success therein, aiding Stewart and Ernest to continue their unlawful acts, removing some of the liquors, the intent, amongst others unlawful, to defraud the plaintiff of the taxes unpaid and due is imputed to him as a reasonable inference established by a preponderance of the evidence. The Court so finds.

See in respect to intent *Lillienthal's Case*, 97

46 *One Big Six Studebaker Automobile, etc., et al.*;

U. S. 264, 268; Ellis vs. U. S. 206, U. S. 257; U. S. vs. Kirby, 7 Wall. 486.

The auto is forfeited and condemned, and an appropriate decree will be entered.

May 25, 1922.

BOURQUIN, J.

Filed May 25, 1922. C. R. Garlow, Clerk. [39]

Thereafter on May 29, 1922, a decree was duly given and filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

IN EQUITY—No. 965.

UNITED STATES OF AMERICA,

Libellant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
Tools and Accessories, and HARVEY NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

Decree.

This cause came on regularly for trial on the 15th day of March, 1921. The United States of

America, Libelant, appeared by its attorneys, John L. Slattery, Esquire, Assistant United States Attorney, and Ronald Higgins, Esquire, Assistant United States Attorney, for the District of Montana. The libelee, Harvey Noble, and the intervenor, Charles Zuckerman, appeared by John N. Thelen, Esquire. The said cause was tried to the Court sitting without a jury, a jury having been expressly waived in open court by the respective counsel for the above-named parties. Whereupon, it was further agreed, in open court, by the said respective counsel for the above-named parties, that the evidence introduced, taken and transcribed in the criminal cause, No. 3926, United States of America vs. Harvey Noble, should be taken and considered as evidence in this cause. Thereupon, additional evidence was submitted on behalf of the libelant and the libelee and intervenor, and after argument of counsel the cause was submitted to the Court, and was thereupon taken under advisement by the Court.

Thereafter, and on the 25th day of May, 1922, the Court being fully advised in the premises, rendered its decision herein and finds:

That all the allegations contained in the libel of information herein are true; that the automobile and tools and accessories [40] described in the libel of information herein became forfeited to the United States of America, on the 8th day of November, 1921; that the United States of America is entitled to a decree forfeiting the said automo-

bile, tools and accessories, as of said 8th day of November, 1921.

Wherefore, by reason of the premises and by virtue of the law, it is hereby ordered, adjudged and decreed, that the automobile described in the libel of information herein, to wit, One Big Six Studebaker Automobile, Model 1919, serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, Engine No. C. F. 2933, Montana State License No. 19521, and one motor meter, two jacks, two hammers, three pliers, one rim wrench, one tool kit, two chains, four wrenches, one oil gun, one wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, and one rim lug, be, and the same are hereby condemned and forfeited to the United States of America; and that the same be sold at a public place in the City of Helena, in the State and District of Montana, at public auction, at a time and place to be set by the United States Marshal, in that behalf, for cash, by said United States Marshal for the District of Montana; that the said marshal shall give fifteen days notice of such sale by advertising in the "Montana Record Herald," a newspaper of general circulation, printed and published in the city of Helena in the State and District of Montana, the same being a newspaper published nearest the said place of sale; and shall within ten days after such sale pay the proceeds thereof to the Clerk of this court, after deducting all proper charges and costs incurred herein, to be allowed by this Court.

It is further ordered, adjudged and decreed, that the United States of America, libelant, do have and recover of and from Harvey Noble, libelee, and from Charles Zuckerman, intervenor herein, its costs and disbursements herein, hereby taxed and allowed in the sum of Thirty and 70/100 Dollars (\$30.70).

Done in open court this 29th day of May, 1922.

BOURQUIN, Judge.

Filed May 29, 1922. Entered June 1, 1922. C. R. Garlow, Clerk. [41]

Thereafter, on August 1, 1922, bill of exceptions was duly signed, settled and allowed by the Court and filed herein, being in the words and figures following to wit: [42]

In the District Court of the United States, for the
District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
Tools and Accessories, and HARVEY NO-
BLE,

Libelee,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

Bill of Exceptions.

BE IT REMEMBERED, that heretofore, to wit, on the 25th day of November, 1921, there was presented and filed in this court, a libel of information against the libelees, which said libel is in words and figures as follows, to wit: (Here insert libel of information.)

That thereafter, on the — day of December, 1921, this defendant and intervenor was granted permission by the Honorable Court to file his answer, which said answer is in words and figures as follows, to wit: (Here insert answer of defendant and intervenor.)

That thereafter, on the 14th day of March, 1922, there was presented and filed in this court, the supplemental answer of defendant and intervenor, which said supplemental answer is in words and figures as follows, to wit: (Here insert supplemental answer of defendant and intervenor.)

That thereafter, on the 15th day of March, 1922, this cause came on regularly for trial in the above-entitled court, before the Honorable George M. Bourquin, Judge presiding. When the following proceedings were had, to wit, the jury being waived, and it being stipulated between the counsels of record, that the evidence, judgment-roll and proceedings had in the criminal action of the United States of America vs. Harvey Noble, be introduced and considered in this case, supplemented by any additional evidence that the parties to this action wish to introduce.

The evidence taken and entered in the case of the United States vs. Harvey Noble, being case No. 3926, is not herein set forth by reason of the fact that there is no contention on the part of this defendant, but that the evidence would justify the Court in his findings of fact, as contained in his opinion filed herein, and set forth, the contention of the defendant being that the verdict of not guilty, in the case of United States of America vs. Harvey Noble, being case No. 3926, is a complete bar to the United States in this proceeding, to ask and [43] demand forfeiture of the automobile and accessories, in which it is alleged, contained intoxicating liquors, as set forth in the information in the case at hand, because of the fact that Noble's defense in the criminal action was not that he had a permit and made a permanent entry, but that he (Noble) neither possessed nor transported the liquor. The judgment-roll in the case of United States of America vs. Harvey Noble, No. 3926 is herewith set forth for the purpose of showing that this procedure is barred by the verdict of not guilty, in said criminal action, and which said judgment-roll is in words and figures as follows, to wit:

“In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARVEY NOBLE,

Defendant.

INFORMATION.

BE IT REMEMBERED, that W. H. Meigs, Assistant United States Attorney for the District of Montana, who for the said United States, in its behalf, prosecutes in his own person, comes here into the District Court of the United States for the District of Montana, on the 22d day of November, 1921, in the September, 1921, term of court, held at the City of Butte, in the State and District of Montana, and for the United States of America gives the Court to understand and be informed:

That on or about the 8th day of October, 1921, one Harvey Noble whose true name is to the informant unknown, in the County of Cascade and in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there, wrongfully and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the Statute in

such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT. [44]

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 8th day of October, 1921, said Harvey Noble, whose true name is to the informant unknown, in the County of Cascade, and in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without making at the time, a permanent record thereof, showing in detail the amount and kind of liquor transported, together with the names and addresses of the consignor and consignee, and the time and place of such transportation; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the informant aforesaid, further gives the Court to understand and be informed:

That on or about the 8th day of October, 1921, said Harvey Noble, whose true name is to the informant unknown, in the County of Cascade, and in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor intended for use in violation of the National Prohi-

bition Act; contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

(Signed) W. H. MEIGS,
Assistant United States Attorney, District of Montana.

United States of America,
District of Montana,—ss.

W. H. Meigs, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and as such makes this verification [45] to the foregoing information; that he knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; the said information being obtained from the transcript of proceedings held before W. S. Frary, a United States Commissioner for the District of Montana, and on file in this court, and who after due examination, found that there was probable cause to hold the defendant herein to bail.

(Signed) W. H. MEIGS.

Subscribed and sworn to before me this 22d day of November, 1921.

[Seal] C. R. GARLOW,
Clerk of the District Court, District of Montana.

Filed November 22d, 1921. C. R. Garlow, Clerk.

In the District Court of the United States in and
for the District of Montana.

No. 3926.

UNITED STATES

vs.

HARVEY NOBLE.

Defendant was duly called for arraignment this day, whereupon D. W. Doyle asked that the names of O'Leary & Doyle be entered as attorneys for defendant, and it was so ordered. Thereupon, said counsel waived the reading of the information and entered a plea of not guilty on behalf of said defendant. Thereafter, the case was ordered set for trial December 19, 1921, at 9:30 A. M.

Entered in open court December 1, 1921.

C. R. GARLOW,
Clerk.

In the District Court of the United States in and
for the District of Montana.

No. 3926.

UNITED STATES

vs.

HARVEY NOBLE.

This cause came on regularly for trial this day, defendant present with his attorney, J. N. Thelen, Esq., and Ronald Higgins, Esq., and W. H. Meigs, Esq., Assistant U. S. Attorneys, appearing for the United States. Dudley Crowther, Court reporter.

Thereupon the following were duly empanelled, accepted and sworn as a jury to try the cause, viz., John V. Carroll, G. L. Sleavy, C. R. Deck, Wm. Gerrard, L. E. [46] Stiles, W. J. Thomas, P. P. Auerbach, B. W. Porter, Chas. R. Elliott, William Enos, Emil Morgan and Gust Nordquist.

Thereupon, Bob Gordon, Guy Palagi, Fred Hou-tari, J. W. Leland, O. H. P. Shelley, and Alex Stuart were sworn and examined as witnesses for the United States, and two bottles of liquor and two sacks were introduced in evidence, whereupon the United States rested. Thereupon, Martin Ernest was sworn and examined as a witness for the de-fendant, whereupon further trial of cause was or-dered continued until 9:30 A. M. to-morrow.

Entered in open court March 6, 1922.

C. R. GARLOW,
Clerk.

In the District Court of the United States in and
for the District of Montana.

No. 3926.

UNITED STATES

vs.

HARVEY NOBLE.

Defendant and respective counsel, with the jury, present as before, and trial of cause resumed. Thereupon, Martin Ernest was recalled as a witness for defendant, and H. A. Prescott, Herman Mauer, Charles Zuckerman, Frank B. Brown, Louis Kom-mers, John L. Slattery, Harvey Noble, W. S. Frary

and Fred Woehner were sworn and examined as witnesses for defendant, the Court records in case No. 965, United States vs. One Studebaker Auto and Noble, were offered in evidence by defendant to show the contents of the automobile, and were admitted in evidence to that extent, whereupon, defendant rested. Thereupon, Bob Gordon and Guy Palagi, were recalled and testified for plaintiff in rebuttal, Alex Remneas was sworn and examined as a witness in rebuttal, and J. W. Leland and O. H. P. Shelley were recalled as witnesses in rebuttal, whereupon plaintiff rested and the evidence closed. Thereupon after the arguments of counsel and the instructions of the Court, the Jury retired to consider of its verdict. The Marshal was ordered to furnish meals and lodging to the jurors and two bailiffs in charge of said jury. Thereafter, at 8:00 P. M. the jury returned into court with its verdict, which was duly received by the Court, read and filed, and by the jury acknowledged to be its true verdict as follows, to wit: 'We, the jury in the above-entitled cause, find the defendant not guilty, John V. Carroll, Foreman.' Thereupon, defendant was discharged. [47]

Entered in open court March 7, 1922.

C. R. GARLOW,
Clerk.

In the District Court of the United States in and
for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARVEY NOBLE,

Defendant.

Verdict.

We, the Jury, in the above-entitled cause, find
the defendant not guilty.

JOHN V. CARROLL,

Foreman.

Filed March 7, 1922. C. R. Garlow, Clerk."

Thereafter, the following evidence was introduced on behalf of the United States and on behalf of the defendant, as follows, to wit:

The COURT.—You may proceed for the plaintiff.

Mr. THELEN.—At this time, your Honor, I understand that we agreed that the evidence that was introduced in the criminal action should be considered by your Honor in this action, with the additional evidence that the United States had, could be introduced at this time; and before that is done, however, I would like to make a motion. And I make the motion that the action be dismissed, on the ground that the libel of information does not state facts sufficient to constitute a cause of action, that the Internal Revenue Law, Section 3450, and the law under which the libel of informa-

tion has been brought, has been repealed by the Eighteenth Amendment, or what is commonly known as the Volstead Law, and that the Court is without jurisdiction in this case. Further, make a motion that the action [48] be dismissed upon the ground that the judgment of acquittal heretofore entered in this court, in which the United States of America was plaintiff and Harvey Noble was defendant, is a bar to this action, the same circumstances and the same facts, and all matters connected with the matter being the same as in this case, and the United States had full opportunity to bring out all of the evidence in that case that could possibly be used in this case. And for that reason, being a case similar to the present case and being only different in the fact that this is an action *in rem* and the other is a criminal action, we believe that this action would be barred by reason of the fact that the jury in the criminal action brought in a verdict of not guilty. There is a case that is in some respects like the present case, I believe; it seems to intimate that that is the law, at any rate, I believe, and that is the case of A. G. Coffey, Claimant, and others, plaintiffs, versus the United States. It is reported in the United States Supreme Court Reports, being—

The COURT.—The number of the United States Reporter?

Mr. THELEN.—116, page 684. We therefore ask that this action be dismissed on the grounds stated.

The COURT.—I assume your motion, in so far as it sets up the ground that the libel is insufficient, is based on your contention that 3450 is repealed?

Mr. THELEN.—Yes, your Honor.

The COURT.—No lack of any of the facts if the law is in existence?

Mr. THELEN.—That is my point, your Honor.

The COURT.—The motion, of course, will be made at any time; counsel will even get the benefit of it at the conclusion of the trial if he should persuade the Court that the law is with him. This point raised as to the judgment of acquittal in case of United States against Noble being *res adjudicata* and a bar to this action. I don't think the Coffey case would support that contention. If the criminal trial had been based on 3450, namely to penalize Noble by a fine [49] for removing the liquor with intent to defraud the United States of taxes, unquestionably, it would bar the forfeiture now involved in this case; but the charge in the other case, as I remember it, and for the purpose of the motion the Court will take into consideration, was that he was transporting liquor without a permit. Now, he might be innocent of transporting liquor without a permit, and yet he might be transporting it or removing it with the intent to defraud the United States of taxes; in other words, he might have had his permit, and thus entitled to his acquittal in the case in which he was tried, and yet he might have made use of the permit and transporting it to avoid tax. There are

different characters of offenses. At this time the motion will be denied.

Mr. THELEN.—Note an exception.

The COURT.—Let it be noted.

The COURT.—Do I understand this case will be tried on the evidence submitted in the case of United States vs. Noble, supplemented of course, if either party desires?

Mr. THELEN.—That is the understanding, your Honor.

The COURT.—Let the record show the fact. The Court has destroyed its notes, not knowing that this case was to come up.

Testimony of H. M. Dengler, for the Libelant.

Whereupon H. M. DENGLER, witness, called upon and sworn on behalf of the libelant, testified as follows:

Direct Examination.

(By Mr. HIGGINS.)

My name is H. M. Dengler. I am an Internal Revenue Agent and also serving as a federal prohibition agent during the month of October, 1921, as well as an Internal Revenue Agent. I have been in the Internal Revenue service for four years lacking one month. My duties as such, are the collection of Internal Revenue with reference to income taxes and distilled spirit taxes and other taxes. There is nothing to indicate that an importation tax has been paid on the two [50] exhibits, one of which has a brand on the bottle marked "Sandy MacDonald Scotch Whiskey," the

(Testimony of H. M. Dengler.)

other of which has a brand on the bottle marked "James Burroughs, Limited, Dry Gin." The stamps on the bottles show that it was made outside of the United States, one of them in London, and the other in Scotland. They are consequently liquor of foreign manufacture. The Gin is 95.8 proof and the Scotch is 89.7 proof.

Cross-examination.

(By Mr. THELEN.)

I do not know whether the liquor was imported into the United States. I do not know but that any stamps that might be on there might have been removed or worn off after it was brought into the United States. I had the bottles in my custody from some time in October until the 14th day of November and the contents were not changed during that period. If it had been changed prior to that time, and after it was brought into the United States, I do not know anything about it. On liquor brought in from foreign countries under the Customs Act, there is a tax of \$2.60 a proof gallon, and under the Internal Revenue Act of 1918, there is a tax of \$2.20 a proof gallon if it is for nonbeverage medicinal purposes, and if brought in for beverage purposes without a permit, a tax of \$6.40 per proof gallon. The taxes are paid at the port of entry, I presume as it is a custom duty. The Internal Revenue tax would be paid to the collector of Internal Revenue. I made a search to ascertain if the tax was paid on these particular bottles, but it is hearsay to me as told by the customs offi-

(Testimony of H. M. Dengler.)

cers. The two bottles were brought in prior to October, and since the time they were manufactured. The contents could have been changed after that time, in so far as I know. There is no date of manufacture on these bottles altho there usually is. I do not know whether there should be a custom stamp on it or not, if it was brought in by the bottle, as I do not know the procedure of the customs officials. If the liquor was resold after it got into the United States for beverage purposes, the Internal Revenue tax of \$6.40 a gallon would become immediately due and payable to the collector of Internal Revenue who would issue a receipt for it; if entered as nonbeverage, a tax of \$2.20 a gallon would be due likewise. I do not know of my own knowledge, whether a receipt [51] was issued for this particular liquor.

Testimony of O. H. P. Shelley, for the Libelant.

Whereupon O. H. P. SHELLEY was called and sworn on behalf of the libelant, testified as follows:

Direct Examination.

(By Mr. HIGGINS.)

My name is O. H. P. Shelley, I am the Federal Prohibition Director for the District of Montana. I assumed that position September 1st, 1921. Since my incumbency in that office, I have not issued a permit to anyone for the importation of intoxicating liquor from Canada or any foreign country. I have not issued a permit to Harvey

(Testimony of O. H. P. Shelley.)

Noble, Martin Ernest, Stewart or Charles Zuckerman.

Cross-examination.

(By Mr. THELEN.)

I have not issued a permit since I have been in office for the importation of liquor from any foreign country. I am the only one that could issue such a permit in Montana. My district is for the State of Montana. The permit could not have been issued by anyone else in the State, for liquor to be brought into Montana.

Testimony of J. J. O'Mahony, for the Libelant.

Whereupon J. J. O'MAHONY, called and sworn on behalf of the libelant, testified as follows:

Direct Examination.

(By Mr. HIGGINS.)

My name is J. J. O'Mahony. I am Special Deputy Collector of Customs. I have served in that capacity for fifteen years. There was no tax paid by anyone for the importation of liquor into the District of Montana and Idaho, so far as I know. I keep the records of the office, and there has been no such payment made by Harvey Noble, Martin Ernest, Stewart or Charles Zuckerman.

Cross-examination.

(By Mr. THELEN.)

We do not issue permits for the importation of liquor for customs duties. We issue a receipt to the person who may pay duty on liquor, that is,

(Testimony of J. J. O'Mahony.)

[52] prior to September 9, 1917, but since that time, we have issued no receipts or permits to anyone for the reason that the importation of liquor is prohibited absolutely. We do not collect any duty at all since September 1st, 1917, but seize the liquor if any should be imported.

Redirect Examination.

(By Mr. HIGGINS.)

No permit has ever been presented to our office by anyone from the Federal Prohibition Director allowing the importation of liquor from any country, in the United States during the year 1921. If there is any tax due, that tax has not been paid, as there were no taxes paid for the importation of liquor during the year of 1921.

Testimony of Charles Zuckerman, for the Defendant and Intervenor.

Whereupon CHARLES ZUCKERMAN, a witness, called and sworn on behalf of the defendant and intervenor, testified as follows:

Direct Examination.

(By Mr. THELEN.)

My name is Charles Zuckerman. I testified in the action of the United States against Harvey Noble, with reference to having a mortgage on the car in the case, which is the same car as in this libel of information.

Q. I will hand you a paper and ask you if that is

a copy of the mortgage that you received on the car? A. Yes, sir.

(Marked Exhibit "A.")

Exhibit "A" of defendant offered in evidence. (Here insert Exhibit "A" of defendant.)

Mr. HIGGINS.—We object on the ground it is incompetent, because it constitutes no defense to this action.

The COURT.—That will be true if the Government makes out a case; and yet he may show his interest; it might involve some right of his in event you fail.

WITNESS.—The mortgage has not been paid, and I am still claiming the car under this mortgage.

No cross-examination. [53]

The COURT.—Anything further?

Mr. HIGGINS.—I believe not, your Honor; I believe that is all.

The COURT.—Incidentally, in reference to the testimony in the other case, did it show where the liquor came from?

Mr. MEIGS.—Yes, sir.

The COURT.—Do you desire to argue it?

(Argument.)

The COURT.—I am reminded, from the argument of the Government, the Court told the jury that the vital matter in the case was whether or not there was any liquor in the car of Noble; that if there was, there wasn't much doubt of his guilt; if there was not, in the jury's judgment, of course

there would be a verdict of not guilty. The jury found Not Guilty. Now, the question is, tentatively, whether or not their finding of not guilty does not involve the finding that there was nothing in the car and to the extent that makes it a matter once tried, not to be tried again,—*res adjudicata*. Even if the Coffey case is not controlling, I would be glad if both of you develop that and see what you can find in the cases. If we give the jury the benefit of an honest judgment—and we must—didn't they find that there was no liquor in that car, and if they did, is it settled once for all so far as this case is concerned? Both have that in mind and see if you can find anything to help the Court,—not saying the case entirely turns on that. It will be submitted.

In the District Court of the United States for the
District of Montana.

No. 965.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
Tools and Accessories, and HARVEY NO-
BLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

Opinion. [54]

This is the usual libel invoking the forfeiture imposed by Sec. 3450, R. S. (Comp. Stats., Sec. 6352) for removal of distilled spirits with intent to defraud plaintiff of taxes thereon, alleging Noble of some interest in the auto, used for the removal aforesaid. He is joined as libelee. The usual notice was published, and Noble made default. Zuckerman intervened, denying the uses aforesaid, and alleging that Noble owns the auto, that intervenor owns a mortgage lien upon the auto and of date prior to the transactions or acts involved, and that in respect to the latter and in this Court, Noble has been charged, tried and acquitted of transporting intoxicating liquor without the permit and record required by the National Prohibition Act, and of possessing such liquor with intent to use it in violation of said act.

Upon trial to the Court, counsel stipulated that Noble has been charged, tried and acquitted as aforesaid, and that the evidence in that trial be submitted in evidence in this.

From that evidence, it appears that the auto transportation and liquors imputed to Noble in the former trial are those imputed to him in this, that in the former trial the plaintiff presented evidence tending to prove that Noble possessed and transported the liquor in circumstances of no permit had and no record made, and that Noble's defense in the former was not that he had a permit and

made a record, but was that he neither possessed nor transported the liquor. It is intervenor's contention that the verdict and judgment in the former trial necessarily determined that Noble neither possessed, nor transported the liquor, that those issues are now *res judicata*, and that to retry them herein is to violate the rule of twice in jeopardy. In support, he relies upon Coffey's case, 116 U. S. 443, wherein Coffey's acquittal upon a trial for the crime denounced by sec. 3450 was held to bar proceedings against him and his property, for the forfeiture consequent upon the crime. This is not that case. There, was identity in fact and law; here, is difference in both.

Noble might be not guilty of any or all the offenses of the former trial, and yet be guilty of the offense of the instant proceedings, or *vice versa*.
[55]

The only fact conclusively proven in the former trial is that Noble was not guilty beyond reasonable doubt of any of the offenses therein charged. Hence, neither *res judicata* nor twice in jeopardy flows or accrues from said trial.

See *Chantagee vs. Abarea*, 218 U. S. 481-483.

Morgan vs. Davis, 237 U. S. 640.

U. S. vs. One Cole Auto, 273 Fed. 936.

Furthermore, not only does Noble waive the plea, but it is not available to persons whose interest like intervenor's vests prior to the former suit, to which they were not parties and out of which the plea might arise, for that they are not

privity to the judgment, and in consequence is not mutual estoppel.

To revert to the evidence, at 1:00 A. M. Nov. 8, 1921, at a point 12 miles from Great Falls, on the highway from said city to Canada, two deputy sheriffs in an auto traveling towards Canada, met this auto driven by Noble, whom they recognized, with him an unrecognized companion. Immediately following Noble was a Buick auto. The officers passed both, promptly returned and re-passed both, and about $\frac{1}{4}$ to $\frac{1}{2}$ mile ahead of the autos met the sheriff and another deputy in an auto, and the officers' car stopped.

Thereupon, Noble turned about and fled toward Canada, and the Buick turned off the road and across country. The sheriff, with two of the deputies pursued Noble, and the other deputy turned his car about and followed.

Traveling 45 to 50 miles per hour, in 3 or 4 miles the Sheriff overhauled Noble, lapped him, and called stop. Whereupon, Noble veered more into the road and before the Sheriff, compelling the latter to fall behind.

A deputy then tried and failed to puncture Noble's gas tank by revolver fire. In 4 or 5 miles, the Sheriff again overhauled Noble, and within 10 or 12 feet of the latter's car, the deputy succeeded in puncturing the tank, the gasoline escaping.

Then, testifies the Sheriff and two deputies, sacks were thrown from Noble's car, the sheriff's car

running over one of them. The Sheriff saw three sacks, one deputy, three, and another deputy, five. At a preliminary hearing a few [56] days after the incident, the Sheriff testified he saw three sacks thrown, and the instant trial testified to seeing two, changing to three, as most likely, upon his attention called to his previous testimony aforesaid, while the deputy now testifying to seeing three sacks, at said hearing testified to two.

Falling back to avoid firing the escaping gasoline, the Sheriff lost sight of Noble's auto, passed on, turned out his lights, returned and saw it with lights out in a field near a farm house. A few minutes later, the deputy following arrived and had two sacks of Canadian bottled whiskey, and gin, and one sack badly broken, found in the road. The Sheriff then seized Noble's auto, Noble and his companion having disappeared. Two of the deputies returned over the road to Great Falls, and looking for more sacks but found none, probably because of weeds along the road, in connection with darkness. The Sheriff remained in the vicinity, placing Noble's car across the road. About daylight, the Buick, in which were Stewart, Ernst and Prescott, returned, and the horn was blown, and followed by the Sheriff they halted at Noble's car.

Virtually, in the Sheriff's custody, in discussion with him, Stewart and Ernst admitted that they had a load of Canadian whiskey and gin, in the Buick at the time of the chase, which they had taken to and deposited in Great Falls. The Sheriff, doubtful of his ability to prove the facts, agreed

to receive the liquors and allow Stewart and Ernst to go with the Buick, Prescott stipulating that the arrangement would also "clean" him.

It appears Prescott was manager of a garage in Great Falls, which was conducted by Noble, vice-president of the owning company, sometimes patronized by Stewart and Ernest. The latter escaping as aforesaid with the load of liquors, went to the garage, and Prescott took them to his residence, where the liquor was deposited in the basement.

Stewart and Ernest claimed they had but seven cases and delivered only that number to the Sheriff, then disappearing with the Buick. A few days later, Noble sought out the Sheriff and with him discussed the status of the former's auto. [57]

The Sheriff delivered the auto to the Federal Agents, these proceedings were instituted Nov. 26, 1921, and hearing was had March, 1922. The evidence further is that the sacks and liquors found in the road are like those delivered to the sheriff by Stewart, Ernest and Prescott, that there was no permit for importation of the liquors, and no taxes for importation had been paid upon them, and that during the chase were some dust, wind, and tumble weeds rolling. In behalf of the intervenor, the evidence is that Stewart and Noble in the Buick brought from Canada, twenty-five cases of Canadian bottled whiskey and gin, in nineteen sacks, that twenty-five miles out of Great Falls, their gasoline failed; that by a passing rancher they sent to Noble's garage a request for delivery to

them five gallons of gasoline; that Noble took it to them in his auto, intervenor going along for the ride; that neither Noble nor intervenor had interest in, or positive knowledge that the Buick was loaded with liquors; that none of the liquors were transferred to or were in Noble's auto; that intervenor had but one arm, and no sacks were thrown from the auto; that when they fled from the officers, they thought the latter were robbers, or "highjackers"; that Noble ran off the road thinking to secure protection at the farm house, but found it vacant; that Noble and intervenor, arriving in Great Falls in the afternoon after the chase, Noble, at the garage, learned the pursuers were officers, and went home to bed and slept till next day; that three times he called at the courthouse to see the Sheriff, finally one evening finding him at the jail; that intervenor made no complaint to the police of loss of the car, but learned from the police and papers the official character of the pursuers; that Prescott allowed the liquors to be stored in his basement because the garage was a public place; that Stewart and Ernest were two sacks short, likely fallen out thru a defective door of the Buick, and Prescott went with them to look for the sacks because it was too early for breakfast or work, and for the ride.

That the two sacks of liquor found by the deputy, were thrown from Noble's auto during the chase is established by a preponderance of the evidence. Intervenor's contention that they had fallen from the Buick, and that what the officers saw, were

tumble weeds blown across the road, and accepted by them [58] for sacks when the deputy appeared with sacks found upon the road of the chase, is untenable in view of all the circumstances. It is believed the officers saw what they testified they saw.

Everything pursuant to the flight and its strategy were with knowledge of the official character of the pursuers and to escape the consequences of guilty conduct. The pursued fled before the chase started. They were on the underground route for liquors, with liquors, and beyond doubt were anticipating to avoid vigilant officers more likely to suddenly appear, than "highjackers" or robbers.

If Noble had no liquor, he had no reason to fear "highjackers," and fear of robbers was unreasonable. These parties are not of fearsome nature. The demeanor and testimony of Noble and Stewart were bold, arrogant, flippant, verging upon the insolent and defiant.

The impression created is of untrustworthiness and discredibility Stewart and Ernest had made many incriminating statements involving Noble. Both subpoenaed by the government in Noble's trial, only Stewart was called. Admitting the statements aforesaid, he jeeringly declared they were false and to deceive the officers, and with gross insolence, and palpable falsehood, sought to persuade that the officers had been in negotiations with him and Ernest for the officers' personal advantage in respect to the liquors and this auto.

Stewart thus treacherous, Ernest was called by Noble, and retracted his statements aforesaid, even as Stewart did. It is noted the statements of Stewart and Ernest incriminating Noble serve only to impeach their contrary statements at the trial, are not otherwise evidence herein.

It is significant they knew they were pursued by officers, that Stewart, Ernest and Prescott deposited the liquors in the latter's basement. If Noble was captured there was fear of search of the garage, and so the liquors were thus concealed. And the immediate return to the scene of the chase by these three was prompted not by search for the lost two sacks, or desire to ride, but to discover the fate of Noble and to serve him if practicable. [59]

If Noble had not known the officers, the natural thing would have been for him, if innocent, strong in the consciousness of it, to at once call up the Sheriff, to set both right, to recover his car.

But he did not. He first consulted counsel. Why? And only met the Sheriff after some days and without appointment or call but by personal journeys, he says, to find him.

Intervenor's interest, his pretense of fear of robbers, for it is that, his failure to notify officers because "wasn't my car" and the impression created on the witness stand, tend to restrain credit for his testimony.

For the defense it is accepted, however, that Noble did deliver gasoline to Stewart and Ernest

about 25 miles out of Great Falls, on the Canada highroad, whether or not the expedition to Canada was shared in by him. There is where Noble received the sacks of liquors. He received them in circumstances of their character and origin, of men and methods, and of time and place that would apprise any intelligent person they were being unlawfully imported, avoiding governmental knowledge, supervision, and dues, and with intent to defraud government of unpaid import taxes, internal and customs, to both of which the liquors are subject by law to the knowledge of all men. More reason had Noble to know these facts and he did know them. In brief, Noble knew the liquors were in process of smuggling from Canada. Participating to success therein, aiding Stewart and Ernest to continue their unlawful acts, removing some of the liquors, the intent, amongst others unlawful, to defraud the plaintiff of the taxes unpaid and due is imputed to him as a reasonable inference established by a preponderance of the evidence. The Court so finds.

See in respect to intent:

Lilienthal's Case, 97 U. S. 264-268.

Ellis vs. U. S. 206 U. S. 257.

U. S. vs. Kirby, 7 Wall. 486.

The auto is forfeited and condemned, and an appropriate decree will be entered.

May 25, 1922.

BOURQUIN, J. [60]

DECREE.

(Title of Court—Title of Cause.)

THIS CAUSE came on regularly for trial on the 15th day of March, 1921. The United States of America, Libelant, appeared by its attorneys, John L. Slattery, Esquire, United States Attorney, and Ronald Higgins, Esquire, Assistant United States Attorney, for the District of Montana. The libelee, Harvey Noble, and the intervenor, Charles Zuckerman, appeared by John N. Thelen, Esquire. The said cause was tried to the Court sitting without a jury, a jury having been expressly waived in open court by the respective counsel for the above-named parties. Whereupon, it was further agreed, in open court, by the said respective counsel for the above-named parties, that the evidence introduced, taken and transcribed in the criminal cause, No. 3926, United States of America, vs. Harvey Noble, should be taken and considered as evidence in this cause. Thereupon, additional evidence was submitted on behalf of the libelant and the libelee and intervenor, and after argument of counsel the cause was submitted to the Court, and was thereupon taken under advisement by the Court.

Thereafter, and on the 25th day of May, 1922, the Court being fully advised in the premises, rendered its decision herein and finds:

That all of the allegations contained in the libel of information herein are true; that the automo-

bile and tools and accessories described in the libel of information herein became forfeited to the United States of America on the 8th day of November, 1921; that the United States of America is entitled to a decree forfeiting the said automobile, tools and accessories, as of said 8th day of November, 1921.

WHEREFORE, by reason of the premises and by virtue of the law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the automobile described in the libel of information herein, to wit: one Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and one motor meter, two jacks, two hammers, three pliers, one rim wrench, one tool kit, two chains, four wrenches, one oil gun, one wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, and one [61] rim lug, be. and the same are hereby condemned and forfeited to the United States of America; and that the same be sold at public place in the City of Helena, in the State and District of Montana, at public auction, at a time and place to be set by the United States Marshal, in that behalf, for cash, by said United States Marshal for the District of Montana; that the said marshal shall give fifteen days notice of such sale by advertising in the "Montana Record-Herald," a newspaper of general circulation, printed and published in the City of Helena, in the State and District of Montana, the

same being a newspaper published nearest the said place of sale; and shall within ten days after such sale pay the proceeds thereof to the Clerk of this Court, after deducting all proper charges and costs incurred herein, to be allowed by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the United States of America, libelant, to have and recover of and from Harvey Noble, libelee, and from Charles Zuckerman, intervenor herein, its costs and disbursements herein, hereby taxed and allowed in the sum of ——— Dollars (\$———).

Done in open court this 29th day of May, 1922.

(Signed) BOURQUIN,
Judge.

MOTION FOR A NEW TRIAL.

(Title of Court—Title of Cause.)

To J. L. Slattery, United States District Attorney:

You will please take notice that the defendant and intervenor, Charles Zuckerman, hereby moves the Court to set aside the decree of the above-entitled Court and to grant him a new trial for the following reasons:

1. That the Court erred in refusing to grant the defendant's motion for dismissal of the above-entitled action on the ground that the verdict of acquittal of Harvey Noble, Defendant, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 2926, in the above-entitled court, was and is a complete bar to the action brought by the United States Gov-

80 *One Big Six Studebaker Automobile, etc., et al.,*
ernment [62] against the above-named defendant and intervenor and libelees in the above-entitled case.

2. That the Court erred in not abiding by the verdict of acquittal of the jury in the criminal action of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, as the basis for his decision in the above-entitled cause.

3. That the Court erred in not rendering and entering judgment in favor of the defendant and libelees and against the libelant in the above-entitled case.

4. That the Court erred in not rendering and entering judgment in favor of the libelees and against the libelant in the above-entitled cause.

5. That the Court erred in not holding the verdict of acquittal of the libelee, Harvey Noble, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 3926, in the above-entitled Court, was not a complete bar to the above-entitled action.

6. That the Court erred in holding that the said Big Six Studebaker Automobile, tools and accessories, were subject to confiscation in the above-entitled action under the laws of the United States.

7. That the Court erred in not sustaining the motion of the defendant and intervenor for the dismissal of the above-entitled action on the ground that sec. 26 of the Volstead Act did repeal sec. 3450 of the Internal Revenue Laws and that the Court had no jurisdiction to try the above-entitled cause.

8. That the Court erred in holding that he had jurisdiction to try the above-entitled cause and that sec. 26 of the Volstead Act did not repeal sec. 3450 of the Internal Revenue Laws.

Said motion is based upon papers, pleadings and files herein and a bill of exceptions hereinafter to be presented, served and filed.

FREEMAN, THELEN & FRARY,
Attorneys for Defendant. [63]

Service of the foregoing notice of motion for a new trial and receipt of copy accepted this 20th day of June, A. D. 1922.

JOHN L. SLATTERY,
Attorney for Libelant.

Filed the 20th day of June, A. D. 1922. C. H. Garlow, Clerk.

(Title of Court—Title of Cause.)

STIPULATION.

It is hereby stipulated and agreed by and between the libelant and the defendant and intervenor, thru their respective counsel of record, that the defendant and intervenor may have to and including thirty (30) days from date hereof in which to present, serve and file his bill of exceptions.

JOHN L. SLATTERY,
Attorney for Libelant.

Dated the 20th day of June, A. D. 1922.

Filed the 20th day of June, 1922. C. H. Garlow,
Clerk.

FREEMAN, THELEN & FRARY,
Attorney for Defendant and Intervenor.

Thereafter, on the 20th day of June, 1922, the Honorable George Bourquin, Judge, on application of defendant and intervenor, and pursuant to said stipulation, made an order in the Court minutes extending the time of defendant which to file his bill of exceptions, and which said order is in words and figures as follows, to wit:

No. 965.

UNITED STATES

vs.

ONE STUDEBAKER AUTO, HARVEY NOBLE,
et al.

Pursuant to stipulation filed herein, and on motion of J. W. Freeman, Esq., attorney for intervenor, Zuckerman, Court ordered that the intervenor be granted thirty (30) days from the date hereof, to prepare, serve and file his bill of exceptions, the District Attorney being present and consenting thereto.

Entered in open court June 20, 1922.

C. R. GARLOW,

Clerk. [64]

Order Settling and Allowing Bill of Exceptions.

AND NOW IN FURTHERANCE OF JUSTICE, and that right may be done, the defendant and intervenor, Charles Zuckerman, tenders and presents the foregoing as his bill of exceptions in this case, to the action of the Court, and prays that the same be settled and allowed and signed and sealed by the Court, and made a part of the record, and the same is accordingly done this 1st day of Aug. 1922.

BOURQUIN,
District Judge.

Service of foregoing bill of exceptions acknowledged and copy received this 20th day of July, 1922.

JOHN L. SLATTERY,
United States District Attorney.

Received by the clerk and delivered to the Court this —— day of July, 1922.

Clerk.

Filed Aug. 1, 1922. C. R. Garlow, Clerk. [65]

That on Mar. 15, 1922, Defendant's Exhibit "A," referred to in the bill of exceptions herein, was introduced at the trial of said cause and filed therein, being in the words and figures following, to wit:

Defendant's Exhibit "A."

THIS MORTGAGE, Made this 22d day of Sept. in the year Nineteen Hundred and twenty-one by H. R. Noble resident of the County of Cascade in the State of Montana, Mortgagor, to Charles Zuckerman resident of the County of Cascade in the State of Montana, Mortgagee;

WITNESSETH, that the said Mortgagor, for and in consideration of the sum of One Thousand and No/100 (\$1000.00) Dollars, hereby mortgages unto the said mortgagee all that certain personal property now in the possession of the said Mortgagor at Great Falls, in the County of Cascade and State of Montana, which is particularly described as follows, to wit:

One (1) Studebaker Touring car, seven passenger, 1919, Model Serial No. 2933, License No. 19521.

Said property above described being all of the property of the kind described, owned by the mortgagor at the time of making this mortgage, and this mortgage includes, also, all property of like kind, hereafter and during the life of this mortgage, acquired by the mortgagor by either increase, or purchase, or by exchange, or substitution for property herein described, also all of said mortgagor's undivided interest in all the crops of every kind and nature and description, including grass, which have been, or may hereafter be sown, grown, cultivated or harvested during the year

A. D. 191—, on the following described real estate, situated, lying and being in the County of — and State of Montana, to wit: — of Section No. —, Township No. —, Range No. —.

As security for the payment of a certain promissory note of even date herewith executed and delivered by the said mortgagor to the said mortgagee, in words and figures as follows:

‘‘1,000.00 Great Falls, Mont. Sept. 22, 1921.

Six Months after date, we, or either of us, promise to pay to the order of Charles Zuckerman One Thousand and no/100 Dollars, for value received, negotiable and payable at Great Falls, Montana, with interest at [66] the rate of ten per cent per annum from — until paid, and reasonable attorney’s fees. The makers and endorsers hereby waive presentment, demand, protest and notice hereof.

Discount —.

No. —.

Due —.

H. R. NOBLE.

And also as security for such further payment and additional sums of money as may, from time to time, hereafter during the life of this instrument, be advanced and loaned by said mortgagee to said mortgagor, together with the interest thereon, which said further advances when made are to be evidenced by notes from said mortgagor to said mortgagee and are to be as fully secured hereby as though the same were specially described

and set forth herein, but for no greater amount, however, than One Thousand and no/100 Dollars.

Provided that the said Mortgagor may remain in possession of said personal property until possession thereof is described by the said Mortgagee or his assigns.

But if said Mortgagee or his assigns shall, at any time, desire the possession of said property, or any part thereof, said Mortgagee or his assigns, and the Sheriff of any County of the State, in which said property or any part thereof may be, are, and each of them is, hereby authorized to take possession of said property, or any part thereof, and sell the same, either at public or private sale, without demand of payment and without notice of said Mortgagor, or to any other persons, of such sale; the said Mortgagor hereby expressly waiving all right to have said property, or any part thereof, sold at public sale, and also waiving all right to any previous demand of payment and to any notice to said mortgagor or to any other person, of such sale. Provided, that whenever the power of sale, herein conferred, shall be executed by a Sheriff, notice of the time and place of such sale shall be posted in three public places in said County at least five days prior to the sale, but such sale may be either public or private. And the person making [67] any sale hereunder, on behalf of said Mortgagee or his assigns, is hereby authorized to retain, out of the proceeds therefrom said principal and interest, or such portion thereof as may then be unpaid, whether due or not, together with

reasonable attorney's fees and the costs and charges of making such sale; the overplus, if any, to be paid to said Mortgagor. And the said Mortgagor hereby consents to the purchase of said property, or any part thereof, by said Mortgagee or his assigns, at any sale hereunder.

It is further agreed in event this mortgage covers a crop, either cereals, roots, or otherwise, either sown, planted or growing, or to be sown, planted or grown, that when the said property hereby mortgaged is gathered or harvested, the said mortgagee, or his assigns, shall be entitled to the immediate possession of the same, and shall have the right to transport and haul the same from the premises wherein the same have been grown, and to sell and dispose of the same for the best price obtainable therefor, and that the cost and expenses of such hauling and transporting shall be borne and paid by said mortgagor, and shall be covered by the lien of this mortgage, and that until such property is so sold and disposed of by said mortgagee, or assigns, the lien of this mortgage upon the said property, wherever the same may be, shall continue and remain in full force and effect, it being understood that any moneys received by said mortgage, or assigns, upon the sale of said property, less the amounts secured by these presents shall be returned to the said mortgagor, heirs or assigns.

It is further agreed that the powers conferred by this mortgage are in addition to and not in substitution of the right of the mortgagee to foreclose

88 *One Big Six Studebaker Automobile, etc., et al.,*
this mortgage by suit as in the case of a mortgage on
real estate.

The mortgagor hereby declares and represents
to the mortgagee that the mortgagor owns said
property, and possesses lawful right and authority
to sell, mortgage and dispose of the same, and that
[68] the same is free and clear of all liens and
encumbrances, and the loan secured herein is ob-
tained by these representations.

The provisions hereof shall be binding upon the
heirs, personal representatives and assigns of the
respective parties hereto.

In witness whereof, the said Mortgagor has here-
unto set his hand and seal the day and year first
above written.

(Signed) H. R. NOBLE.

Executed in the presence of

State of Montana,
County of Cascade,—ss.

On this 22d day of Sept., in the year 1921, before
me, Edyth Calcott, a notary public for the State
of Montana, personally appeared H. R. Noble,
known to me to be the person whose name is sub-
scribed to the within instrument, and he acknowl-
edged to me that he executed the same.

In witness whereof I have hereunto set my hand

and affixed my notarial seal the day and year in this Certificate first above written.

[Seal]

EDITH COLCOTT,

Notary public for the State of Montana, Residing
at Great Falls, Montana.

My commission expires Jan. 28, 1924.

INDIVIDUAL AFFIDAVIT.

State of Montana,

County of Cascade,—ss.

Charles Zuckerman, the mortgagee named in the foregoing mortgage of personal property, being duly sworn, deposes and says that the said mortgage is made in good faith to secure the amount named therein, and without any desire to hinder, delay or defraud [69] creditors.

(Signed) CHARLES ZUCKERMAN.

Subscribed and sworn to before me this 22d day of Sept. A. D. 1921.

[Seal]

EDITH COLCOTT,

Notary Public for the State of Montana, Residing
at Great Falls, Montana.

My commission expires Jan. 28th, 1924.

I hereby certify that I have this day received a true and correct copy of the foregoing chattel mortgage.

(Signed) H. R. NOBLE.

Dated Sept. 22d, 1921.

In the District Court of the United States for the
District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
Tools and Accessories, and HARVEY
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

Petition for Writ of Error.

Now comes Charles Zuckerman, defendant and intervenor herein, and says that on or about the 29th day of May, 1922, this Court entered judgment herein in favor of the Libelant and against the defendant and intervenor, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant and intervenor, all of which will be more fully and in detail appear from the assignment of errors which is filed with this petition.

Wherefore, defendant and intervenor prays that a writ of Error may issue in his behalf to the United States Circuit Court of Appeals for the Ninth Judicial District, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly

92 *One Big Six Studebaker Automobile, etc., et al.*,
authenticated, may be sent to the said Circuit Court
of Appeals.

Dated this 20th day of September, 1922.

FREEMAN, THELEN & FRARY,
Attorneys for Defendant and Intervenor.
Service accepted Sept. 25, 1922.

JOHN L. SLATTERY,
U. S. Attorney.

Filed Sept. 25, 1922. C. R. Garlow, Clerk. [71]

Thereafter, on Sept. 25, 1922, assignment of
errors was duly filed herein, being in the words and
figures following, to wit: [72]

In the District Court of the United States, for the
District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
Tools and Accessories, and HARVEY
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

Assignment of Errors.

Comes now Charles Zuckerman, defendant, in the
above numbered and entitled cause and in connec-

tion with his petition for writ of error in this cause assigns the following errors which the defendant avers occurred in the trial thereof and upon which he relies to reverse the judgment entered herein as appears of record:

1. That the Court erred in not sustaining the motion of the defendant and intervenor for dismissal of the above-entitled action on the ground that the acquittal of Harvey Noble, defendant, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 3926 in the above-entitled court, was and is a complete bar to the action brought by the United States Government against the above-named defendant and intervenor and libelees in the above-entitled case.

2. That the Court erred in not abiding by the verdict of acquittal of the jury in the criminal action of the United States of America, Plaintiff, vs. Harvey Noble, [73] defendant, as the basis for his decision in the above-entitled cause.

3. That the Court erred in not rendering and entering judgment in favor of the defendant and intervenor and libelees and against the libelant in the above-entitled case.

4. That the Court erred in not rendering and entering judgment in favor of the libelees and against the libelant in the above-entitled cause.

5. That the Court erred in not holding that the verdict of acquittal of the libelee, Harvey Noble, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 3926

in the above-entitled court, was not a complete bar to the above-entitled action.

6. That the Court erred in holding that the said Big Six Studebaker Automobile, tools and accessories were subject to confiscation in the above-entitled action under the laws of the United States.

7. That the Court erred in not sustaining the motion of the defendant and intervenor for dismissal of the above-entitled action on the ground that Sec. 26 of the Volstead Act did repeal Sec. 3450 of the Internal Revenue Laws and that the court had no jurisdiction to try the above-entitled cause.

8. That the Court erred in holding that he had jurisdiction to try the above-entitled cause and that Sec. 26 of the Volstead Act did not repeal Sec. 3450 of the Internal Revenue Laws. [74]

9. The Court erred in not holding that under the facts in this case as set forth in the Court's opinion, that Section No. 3450 of the Revised Statutes was not superseded by the National Prohibition Act in that the Court found that the whiskey that the automobile in question was used to remove, was Canadian whiskey and gin.

10. The Court erred in not holding that the whiskey and gin removed in the said automobile, if at all, had not been manufactured in an industrial plant, and therefore not taxable under Title 3 of the National Prohibition Act.

11. The Court erred in not holding that the facts of this particular case show a violation of the National Prohibition Act and arose solely thereunder, if at all.

{ WHEREFORE, the defendant and intervenor prays that judgment of the said Court be reversed.

FREEMAN, THELEN & FRARY,

Attorneys for the Defendant and Intervenor.

Service accepted Sept. 25, 1922.

JOHN L. SLATTERY,

U. S. Attorney.

Filed Sept. 25, 1922. C. R. Garlow, Clerk. [75]

Thereafter, on Sept. 25, 1922, an order allowing writ of error was duly filed and entered herein, being in the words and figures following, to wit:
[76]

In the District Court of the United States, for the
District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
Tools and Accessories, and HARVEY
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

Order Allowing Writ of Error.

This 25th day of September, 1922, came the defendant above named by his attorneys and filed herein and presented to the Court his petition pray-

ing for the allowance of a writ of error and assignment of errors intended to be urged by him; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such order and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does allow the writ of error.

It is further ordered that the amount of the security herein to be furnished by the said defendant and intervenor be, and the same is hereby, fixed at the sum of \$300, and that upon the making and filing with the Clerk of this court of a good and sufficient undertaking in said sum by the said defendant, all further proceedings herein be superseded and stayed until the final determination of said appeal by the said United States Circuit Court of Appeals, and until [77] the further order of this Court.

Dated this 25th day of Sept., 1922.

BOURQUIN,

Judge.

Filed Sept. 25, 1922. C. R. Garlow, Clerk. [78]

Thereafter, on Sept. 25, 1922, a supersedeas bond was duly filed herein, being in the words and figures following, to wit: [79]

In the District Court of the United States, for the
District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
Tools and Accessories, and HARVEY
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS, that whereas, at a regular term of the District Court of the United States for the District of Montana, in a suit pending in said court, between the United States of America, as libelant, and One Big Six Studebaker Automobile, tools and accessories and Harvey Noble, as libelees, and Charles Zuckerman, as defendant and intervenor, cause No. 965 in the law docket of the said court, final judgment was rendered against Charles Zuckerman on the 29th day of May, 1922, decreeing that said One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and one motor meter, two jacks,

two hammers, three pliers, one rim wrench, one tool kit, two chains, four wrenches, one oil gun, one wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, and one rim lug, be, and the same are hereby condemned and forfeited to the United States of America; and that the same be sold at a public place in the City of Helena, in the State and District of Montana, at public auction, at a time and place to be set by the United States Marshal, in that behalf, for cash, by said United States marshal for the District of Montana; and for costs, amounting to the sum of \$18.00 with interest thereon at the rate of eight per cent per annum from May 29th, 1922, and the said Charles Zuckerman has obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said United States of America, defendant in error, citing it to appear before the United States Circuit Court of Appeals for the Ninth Circuit to be [80] holden at San Francisco, in the State of California, according to law, within thirty (30) days from the date hereof.

Now, therefore, in consideration of the premises and of such appeal, the undersigned Fred A. Woehner and W. S. Frary, as sureties, do hereby undertake in the sum of ——— dollars, that the said Charles Zuckerman will prosecute his said writ of error to effect and answer all damages and costs if he fails to make his plea good, and if the judg-

ment appealed from be affirmed, or the appeal dismissed, the said plaintiff in error will pay the amount directed to be paid by said judgment or order and all damages and costs which may be awarded against the plaintiff in error upon the said appeal.

FRED A. WOEHNER.
W. S. FRARY.

State of Montana,
County of Cascade,—ss.

On the 25th day of September, 1922, personally appeared before me Fred H. Woehner and W. S. Frary, respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said Fred H. Woehner and W. S. Frary, being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and householder of the said County of Cascade and that he is worth the sum of \$300 over and above his just debts and legal liability and property exempt from execution.

FRED A. WOEHNER.
W. S. FRARY.

Subscribed and sworn to before me this 25th day of September, A. D., 1922.

[Seal] JOHN M. THELEN,
Notary Public for the State of Montana, Residing at Great Falls, Montana.

100 *One Big Six Studebaker Automobile, etc., et al.,*

My commission expires September 13, 1925.
[81]

The within bond is approved both as to sufficiency and form this 25th day of September, 1922.

BOURQUIN,

Judge.

Filed Sept. 25, 1922. C. R. Garlow, Clerk. [82]

Thereafter, on Sept. 25, 1922, citation was duly issued herein, which original citation is hereunto annexed and is in the words and figures following, to wit: [83]

In the District Court of the United States for the
District of Montana.

UNITED STATES OF AMERICA,

Libellant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
Tools and Accessories, and HARVEY
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

Citation.

United States of America,—ss.

The President of the United States to the United
States of America, GREETING:

You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the date of this Writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Montana, wherein the United States of America is plaintiff and libelant, and One Big Six Studebaker Automobile, tools and accessories, and Harvey Noble are libelees, and Charles Zuckerman is defendant and intervenor, the said United States of America being defendant in error, to show cause, if any there be why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEO. M. BOURQUIN, Judge of the District [84] Court of the United States, for the District of Montana, and the seal of the said District Court this 25th day of September, 1922.

BOURQUIN,
United States District Judge Presiding in the said
District Court of the State of Montana.

Attest: _____, Clerk.

FREEMAN, THELEN & FRARY,

Attorneys for Defendant and Intervenor. [85]

Service of the foregoing citation is hereby admitted this 25th day of September, 1922.

JOHN L. SLATTERY,
United States District Attorney. [86]

[Endorsed]: No. 965. In the District Court of the United States for the District of Montana. United States of America, Libelant, vs. One Big Six Studebaker Automobile et al., Libelees, and Charles Zuckerman, Intervenor. Citation. Filed Sept. 25, 1922. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

Thereafter, on Sept. 25, 1922, a writ of error was duly issued herein, which original writ is hereunto annexed and is in the words and figures following, to wit: [87]

In the District Court of the United States for the
District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,
Tools and Accessories, and HARVEY
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

Writ of Error.

To the President of the United States of America,
and to the Judge of the District Court of the
United States for the District of Montana,
GREETING:

Because in the record and proceedings and also

in the rendition of the judgment of a plea which is in the said District Court of the United States, for the District of Montana, before you, between the United States of America, Libelant, and One Big Six Studebaker Automobile, tools and accessories, and Harvey Noble, libelees, and Charles Zuckerman, defendant and intervenor, manifest errors have happened to the great damage of the said Charles Zuckerman, defendant and intervenor, as is said and appears by the answer and the record herein, and it being fit that the errors, if any there have been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, you are hereby

Commanded if judgment be therein given, that thereunder your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States [88] Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, together with this Writ so that you may have the same at the City of San Francisco, State of California, within thirty days from the date of this writ in the said United States Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid may be inspected, and the said United States Circuit Court of Appeals may cause further to be done therein to correct said errors, if any, and to do what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 25th day of September, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]

C. R. GARLOW,

Clerk of the District Court of the United States,
for the District of Montana.

By H. H. Walker,

Deputy. [89]

RETURN TO WRIT OF ERROR.

United States of America,

District of Montana,—ss.

In obedience to the command of the within Writ, I herewith transmit to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the United States District Court for the District of Montana, this 18th day of October, A. D. 1922.

[Seal]

C. R. GARLOW,

Clerk U. S. District Court, District of Montana.

[90]

Due service of the within writ of error is hereby admitted this 25th day of September, 1922.

JOHN L. SLATTERY,

United States District Attorney. [91]

[Endorsed]: In the District Court of the United States for the District of Montana. United States

of America, Libelant, vs. One Big Six Studebaker Automobile et al., Libelees, and Charles Zuckerman, Intervenor. Writ of Error. Filed Sept. 25, 1922. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 91 pages, numbered consecutively from 1 to 91, inclusive, is a full, true and correct transcript of the record and all proceedings had in the within entitled case, as appears from the original records and files of said case in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Writ of Error and citation issued in said case.

I further certify that the costs of the transcript of record amount to the sum of Thirty-six and 65/100 Dollars, and have been paid by the plaintiff in error.

Witness my hand and the seal of said court at Helena, Montana, this 18th day of October, A. D. 1922.

[Seal]

C. R. GARLOW,
Clerk. [92]

[Endorsed]: No. 3934. United States Circuit Court of Appeals for the Ninth Circuit. One Big Six Studebaker Automobile, Tools and Accessories, and Harvey Noble, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed October 23, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3934.

UNITED STATES
CIRCUIT COURT OF APPEALS 6
FOR THE NINTH DISTRICT

ONE BIG SIX STUDEBAKER AUTOMO-
BILE, TOOLS AND ACCESSORIES,
AND HARVEY NOBLE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

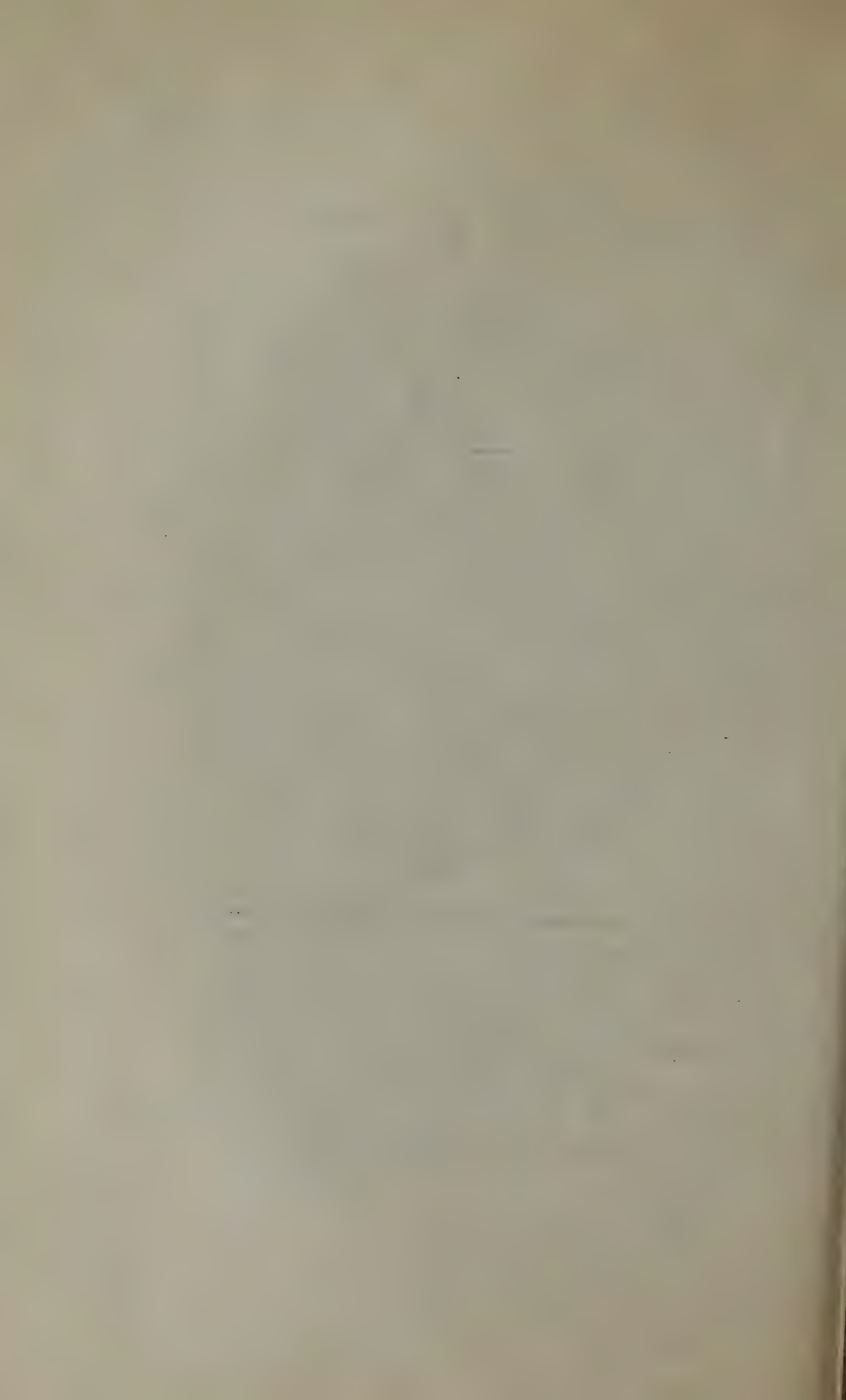
BRIEF OF APPELLANT

FREEMAN, THELEN & FRARY,
Solicitors for Intervenor and Appellant.

Filed 1923

..... Clerk

FILED
JUL 15 1923
F. D. McWILLIAMS
CLERK



UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH DISTRICT

ONE BIG SIX STUDEBAKER AUTOMO-
BILE, TOOLS AND ACCESSORIES;
AND HARVEY NOBLE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF APPELLANT

STATEMENT OF FACTS.

This action was brought in the District Court of the United States for the District of Montana by the United States of America, as Libellant, against One Big Six Studebaker Automobile and Accessories and Harvey Noble, as Libelees.

Prior to the commencement of this action, an information was filed on November 22nd, 1921, under the National Prohibition Act against Harvey Noble in the same Court, charging the said Harvey Noble with transporting intoxicating liquors without a permit or making a record thereof. (See Trans. p-32.) Shortly thereafter

on November 26th, 1921, this libel of information was filed under Section 3450 of the Internal Revenue Laws, against One Big Six Studebaker Automobile, Accessories and Harvey Noble. (See Trans. p-32.) A petition in Intervention together with answer was filed on behalf of Charles Zuckerman (see Trans. p-17), claiming the said Big Six Studebaker Automobile under a chattel mortgage by reason of the failure of the said Harvey Noble to perform the conditions of the said chattel mortgage given by him to the said Intervenor.

On March the 6th, 1922, the trial of Harvey Noble was had and the jury returned a verdict "not guilty" (See Trans. p-57). Subsequently, thereto, on March 14th, 1922, a supplemental answer was filed by the Intervenor, Charles Zuckerman, setting forth as a defense in this action the acquittal of Harvey Noble (See Trans. p-24).

It was stipulated at the beginning of the trial of this action that it was to be tried upon the evidence in the criminal action of the United States of America vs. Harvey Noble, supplemented by such additional proof as either side wish to introduce (See Trans. p-22). A motion was made (See Trans. p-58) on behalf of the defendant and intervenor that this action be dismissed on the ground that Section 3450 of the Internal Revenue Laws had been repealed by the Eighteenth Amendment to the Constitution,

commonly known as the National Prohibition Act, and also on the further ground that the judgment of acquittal in the case in which United States of America was plaintiff and Harvey Noble, Defendant, was a bar to this action, the same facts and circumstances and all matters connected with that case being the same as in this case. The Court denied the motion at the time and subsequently after all evidence was submitted took the same under advisement and thereafter decreed that the car be forfeited (See Trans. p-77), from which decision, this appeal has been taken.

ASSIGNMENT OF ERRORS.

1. That the Court erred in not sustaining the motion of the defendant and intervenor for dismissal of the above-entitled action on the ground that the acquittal of Harvey Noble, defendant, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 3926 in the above entitled Court, was and is a complete bar to the action brought by the United States Government against the above-named defendant and intervenor and libelees in the above-entitled case.

2. That the Court erred in not abiding by the verdict of acquittal of the jury in the criminal action of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, as the basis for his decision in the above entitled cause.

3. That the Court erred in not rendering and entering judgment in favor of the defendant and intervenor and libelees and against the libelant in the above entitled case.

4. That the Court erred in not rendering and entering judgment in favor of the libelees and against the libelant in the above-entitled case.

5. That the Court erred in not holding that the verdict of acquittal of the libelee, Harvey Noble, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 3926 in the above entitled Court, was not a complete bar to the above-entitled action.

6. That the Court erred in holding that the said Big Six Studebaker Automobile, Tools and Accessories were subject to confiscation in the above-entitled action under the laws of the United States.

7. That the Court erred in not sustaining the motion of the defendant and intervenor for dismissal of the above-entitled action on the ground that Section 26 of the Volstead Act did repeal Section 3450 of the Internal Revenue Laws and that the Court had no jurisdiction to try the above-entitled cause.

8. That the Court erred in holding that he had jurisdiction to try the above-entitled cause and that Section 26 of the Volstead Act did not

repeal Section 3450 of the Internal Revenue Laws.

9. The Court erred in not holding that under the facts in this case as set forth in the Court's opinion, that Section 3450 of the Revised Statutes was not superseded by the National Prohibition Act, in that the Court found that the whiskey that the automobile in question was used to remove, was Canadian whiskey and gin.

10. The Court erred in not holding that the whiskey and gin removed in said automobile, if at all, had not been manufactured in an industrial plant, and therefore, not taxable until Title 3 of the National Prohibition Act.

11. The Court erred in not holding that the facts of this particular case show a violation of the National Prohibition Act and arose solely thereunder, if at all.

ARGUMENT OF APPELLANT.

Discussing errors one, two, three, four and five to the effect that the Court erred in not sustaining a motion of the defendant and intervenor for dismissal of the above-entitled action on the ground that the acquittal of Harvey Noble, defendant in the case of United States of America, Plaintiff, vs. Harvey Noble, Defendant, action 3926 in the above-entitled Court was and is a complete bar to this action brought by the United States Government against the

above-named defendant and Intervenor and libelees in the above entitled case.

If the action concerning the forfeiture of the Studebaker Car and Accessories had been brought under the Volstead Act, there could be no question as to the outcome, since the conviction of the person arrested is the controlling feature to enable the Government to sell a car as was held in *United States vs. Slusser* 270 Fed. 821 where the Court says:

"The seizing officer is to have the vehicle in possession on the day of the trial of the person arrested to abide the judgment in the same proceeding. Should the defendant be acquitted, the automobile must be released for it is only upon conviction that a sale may be ordered."

Section 26, Title 2, of the Volstead Act, the following statement is found:

"The Court upon *conviction* of the person so arrested, shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, order the car to be sold."

Again, in *United States vs. One Cadillac Touring Car* 274, Fed. 472, the Court says:

"That upon the conviction of the person so arrested, the Court shall order a public sale of the property so seized unless good cause to the contrary is shown by the owner. This being a special statutory proceeding, the procedure thus prescribed must of course be strictly followed. It seems clear that the section in question contemplates and requires as a prerequisite to the sale of property seized, a judicial determination that such property

has been used in violation of the law. Considering the reference to the person discovered in the act of violating the law, to the 'person in charge,' who is to be arrested, to the 'person arrested,' who is to be prosecuted, to the day of trial' and to the order of sale, which is to be made by the Court 'upon the conviction of the person so arrested.' I reach the conclusion that the statute requires a jurisdictional basis for the sale in question, a conviction of the person so arrested, and that until such conviction, the Court cannot order such sale by virtue of any authority conferred by said section."

United States vs. One Buick Roadster
276 Fed. 407

United States vs. Slusser (D. C.)
270 Fed. 818

United States vs. One Stephens Automobile (D. C.) 272 Fed. 188.

So it is quite apparent that if the action concerning the forfeiture of the car was brought under the Volstead Act, the Court would be bound by the provisions of that act which would necessitate a conviction of the person criminally charged with transportation before the car can be forfeited to the State to be sold on sale.

If both the criminal action and the action *in rem* against the car had been brought under the Internal Revenue Act, the case of Coffee vs. United States 29 Law Ed. 681 would be conclusive. In that case the defendant was charged with attempting to defraud the United States of a tax on distilled spirits and was acquitted in the said action. In a subsequent action *in*

rem for the forfeiture of certain vessels and containers used in the manufacturing of the distilled spirits by the said defendant, the Court said:

“The existence of the same act or fact is involved as in the criminal prosecution, is in issue as a cause for the forfeiture of such property, the judgment of acquittal in conclusive in favor of the defendant, as claimant of the property involved in the subsequent suit *in rem*. Yet where an issue raised as to the existence of the act or fact by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where as against him, the existence of the same act or fact is the matter in issue as a cause for the forfeiture of the property. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in a suit *in rem*. Nevertheless, the fact or act has been put to issue, and determined against the United States, and all that is imposed by the statute as a consequence of guilt is a punishment thereof. There can be no new trial of the criminal prosecution after the acquittal in it, and a subsequent trial of the civil suit amounts to the same thing with a difference only in the consequences following a judgment adverse to the claimant. The judgment of acquittal in the criminal proceedings ascertained that the facts which were a basis of that proceeding and are a basis of this one and which are made by the statute the foun-

dation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all between the United States and the claimant in the criminal proceedings, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts.”

Also in the case of United States vs. McKee (4 Dill, 128; Fed. Cases No. 15688), the defendant has been indicted, convicted and punished for having conspired with certain distillers in violation of the Revised Statutes of the United States to defraud the United States by unlawfully removing distilled spirits without the payment of taxes thereon. He was afterwards sued in a civil action by the United States under another section of the Revised Statutes to recover a penalty given thereby of double the amount of the taxes caused by such conspiracy and fraud. The transaction giving rise to the criminal prosecution and punishment and the liability to the penalty were the same. It was held that the suit for the penalty was barred by the criminal trial, conviction and punishment, as defendant could not be twice punished for the same offense. This case is cited and approved in *Coffee vs. the United States (supra)* at Page 687, 29 Law Ed.

“Where defendant was acquitted in a criminal prosecution of causing to be transported certain casks containing bottled beer, falsely marked, as containing bottled soda water such acquittal was a bar to the subsequent main-

tainance of an action by the United States to forfeit the property and recover a penalty for the same acts imposed by Revised Statute 3449."

U. S. vs. Seattle Brewing and Malt-
ing Company, 135 Fed. 597.

"We are also clearly of the opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of the offenses committed by him, though they may be civil in form are in their nature criminal. These are the penalties affixed to the criminal acts and the forfeiture sought by this suit being one of them. The information though actually a civil proceeding is in substance and effect a criminal one."

Boyd vs. United States, 29 Law Ed.
Page 746.

"The right of the United States to seize and forfeit the distilled spirits is because they are brought in in violation of law, and the right if it exists to seize and forfeit the instrumentalities used by the wrong doer in bringing in such merchandise, contrary to law, must be based on the fact that they are used in commission of an offense against the United States. *If the offense has not been committed then there can be no right of seizure of forfeiture.* In the cases of offending against the act of August 10th, 1917, no revenue is to be collected, and the offense of bringing in distilled spirits is made a crime and the act itself denounces the penalty. Having been indicted and fined or imprisoned, one or both the defendant has answered to the defense and a proceeding in its nature criminal, to take the property, especially the instrumentalities used, is a proceeding not against such property alone but against the offender, and an attempt to take and forfeit

his property not because the United States has any interest in it, but for the alleged reason, he used it, as an instrumentality in the commission of the crime, and, as to the spirits themselves, it is a taking and a forfeiture to the United States because of their being in the United States contrary to law."

In re: Food Conservation Act, 254 Fed. 893.

U. S. vs. A Lot of Precious Stones, 134 Fed. 61.

U. S. vs. One Distillery, 43 Fed. 846.

The lower Court suggests that the appellant cannot abide by the decision in *Coffee vs. U. S.* (*Supra*) and the other cases approving the same doctrine because of the fact that in this action there is neither identity of issues or parties and that the only fact that is conclusively proven in the criminal action was the fact that Noble was not guilty beyond reasonable doubt of any offenses therein charged, therefore neither *res-adjudicata* nor twice in jeopardy, flows or accrues from said trial, citing the following cases:

Chantagee vs. Abarea, 218 U. S. 481-483.

Morgan vs. Davis, 237 U. S. 640.

U. S. vs. One Cole Auto, 273 Fed. 936.

The first case of *Chantagee vs. Abarea* holds that a civil action for indemnification for the damages resulting from a malicious burning of a store house or its contents cannot be maintained in the Philippine Courts where there has been a judgment of acquittal against the same

defendant for the same malicious burning in view of the positive legislation in the Philippine Codes, civil and criminal, drawing a distinction between civil liability which results from mere negligence of defendant, and otherwise. Certainly this would not tend to support the contention raised in the Judge's statement and if the Court sought to support its conclusions by the dicta in the above mentioned case we would call the Court's attention to Page 1119, of 54 L. E. of said case which quotes Justice Harlan as he reviewed the application of the Coffee case in *Stone vs. United States*, 42 Law Ed. 127, as follows:

“In the present case the action against Stone is purely civil. It depends entirely upon the ownership of certain personal property. The rule established in Coffee's case can have no application in the civil case not involving any question of criminal intent or a forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of the property. In the criminal case the government sought to punish a criminal offense, while in the civil case it only seeks in its capacity as owner of property illegally converted to recover its value.”

What clearer statement of law can be made than that above cited. Certainly the government is not bringing this action as the owner of the Studebaker car and claiming that Zuckerman illegally converted it. The government never once contended but that Zuckerman owned the car and the only reason they brought

this action was to punish a criminal offense; clearly not coming under the limitation to the Coffee case as applied in *Stone vs. United States (Supra)*, thus the counsel is at loss to see where the lower court can claim any support in its statement by citing the above mentioned case.

The next case cited by the lower court is that of *Morgan vs. Devine*, 59 L. Ed. 1153, in which case it is held that where the statute makes the stealing of postage stamps or funds and the breaking into post offices as separate crimes, and the defendants pleaded guilty to both counts, they could be sentenced to serve the penalty provided in each offense although both charges related to and grew out of one transaction. The distinguishing feature between that case and the one at hand is, that in the former there was a conviction and in the present case there was an acquittal as to all counts in the information. The acquittal would pertain as well as to one count as to the others and Noble's sole defense being that he had no liquor (See *Trans.* p-38), the acquittal should have as much effect upon all counts mentioned in said information, as the confessed guilt of the two defendants in the case cited by the Court. If Noble had pleaded guilty to all counts, the Court could have sentenced him under each count with the specific penalty as provided for in each instance and set forth under Section 29 of the National Prohibition Act. However, in the case

at hand it is not a distinct or separate offense that is being tried, but simply the penalty for an offense which the Government claimed to have taken place, but which they have not proven as yet because of the fact that the Government used the same evidence to prove the penalty as they did to prove the crime, and, as they failed to prove the crime, certainly the plea of *resadjudicata* is good as a defense against the Government when they sought to prove the forfeiture for the offense under the same evidence which they sought to prove the crime. It is clear that the case cited by the Court is entirely surrounded by different facts and based upon totally different grounds from this case.

The next case cited by the Court is that of the U. S. vs. One Aero Eight, 273 Fed. 936, which held that the Revised Statute Section 3450 was not repealed by the provisions of the National Prohibition Act. There is no question of *resadjudicata* raised that the counsel has been able to discover and in our opinion the case cannot be held to support the objections raised by the Court.

The other objection that is raised is the fact that Zuckerman cannot avail himself of the plea of *resadjudicata* because he was not the party to the criminal action. At the first blush this seems to be a formidable objection, but on closer examination it loses its merit. In the first place the Government did not make Charles Zucker-

man a defendant in either action nor did they claim that he had anything to do with the transportation of the intoxicating spirits in question, and so far as we are concerned in this issue at hand, we can drop the name of the defendant and intervenor because at all times Zuckerman's rights were subsequent and subserviant to those of Noble. In other words if the jury had found Noble guilty, Zuckerman would have lost his car under Section 3450 R. S. as it makes no difference how innocent the owner of the car may be.

“There may indeed be a greater risk to the owner of the property in one form or purpose of this bailment than in others, but the wrong cannot be indicted to him by reason of the form or purpose. It is illegal use that is a material consideration, it is that which works a forfeiture, the guilt or innocence of its owner being accidental. We should regard simply the adaptability of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. It is a “thing” that can be used in removal of “goods and commodities” and the law is explicit in its condemnation of such things.”

Goldsmith, Jr., Grant Co. vs. U. S. 65
Law Ed. 376.

It is the illegal use that is a material consideration and it is that which works a forfeiture of the article, the guilt or innocence of its owner being accidental. It would indeed be a strange rule of law that states that if a man be convicted of transporting distilled spirits, the owner

of the car shall lose the same, innocent as the owner may be of violating any laws, and, then turn about and state that the owner of the car cannot now come in and set up the acquittal of the person criminally charged and have the benefit of the same, because the owner was not a party to both actions, especially in view of the fact that the same evidence for the forfeiture of the car and in the criminal action were one and the same. The parties in the case so far as the libelees were concerned are the same in both actions, that is, Harvey Noble was defendant in the criminal action and in the proceeding *in rem* Harvey Noble, Studebaker Car and Accessories, were libelees, so that the contention and supposition raised by the lower court is without merit and the Coffee case (*Supra*) should be construed so as to allow the defendant and intervenor the benefit of the acquittal of Harvey Noble in the criminal action, under the rulings therein stated that they were the same parties in both actions. In further support of the plea of *res adjudicata* we cite U. S. vs. Openheimer 61 Law Ed. 161.

“Where a criminal charge has been adjudicated by a court having jurisdiction to hear and determine it, that adjudication whether it takes the form of an acquittal or conviction, is final as to the matter adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. In this respect the criminal law is in unison with that which prevails in civil proceedings.”

Queen vs. Miles 24 Q. B. D. 423;
U. S. vs. Salen 244 Fed. 296;
Sierra vs. U. S. 233 Fed. 37.

The statement made by the lower court that the only thing that is conclusively proven in the former trial is that Noble was not guilty beyond a reasonable doubt of any offenses there charged is clearly contrary to the Coffee vs. United States (*Supra*) wherein it is stated as follows:

“It is urged as a reason for not allowing such effect to the judgment that the acquittal of a criminal action may have taken place because of the rule requiring the guilt to be proven beyond a reasonable doubt and that on the same evidence, on the question of the preponderance proof there might be a verdict for the United States in the suit *in rem*. Nevertheless the fact or act has been put to issue and determined against the United States and all that is imposed by the statute as a consequence of guilt is a punishment thereof.”

It has been further urged that these two cases are in fact different character of offenses, in other words Noble might have had a permit and yet be transporting or removing it with intent to defraud the United States of a tax. It is not to be questioned that if the latter part of the statement was true that the plea of *res adjudicata* would be without merit as Noble would be entitled to an acquittal in the criminal action if he showed that he had a permit and yet that would not relieve him of the payment of taxes

to the United States and the car would be entitled to be forfeited. But such is not the case in hand as can be seen from the Transcript (page 66).

“The Court: I am reminded from the argument of the Government the Court told the jury that the vital matter in the case was whether or not there was any liquor in the car of Noble; that if there was there wasn’t much doubt as to his guilt, if there was not in the jury’s judgment, of course, there would be a verdict of not guilty. The jury found not guilty. Now the question is tentatively, whether or not the finding of not guilty does not involve the finding that there was nothing in the car, and, to that extent makes it a matter once tried not to be tried again—*res adjudicata*. . . . If we give the jury the benefit of an honest judgment, and we must, didn’t they find that there was no liquor in that car, and, if they did, is it settled once for all so far as this case is concerned.”?

Again see Transcript (page 68):

“That in the former trial the plaintiff presented evidence tending to prove that Noble possessed and transported the liquor in circumstances of no permit had and no record made, and that Noble’s defense in the former was not that he had a permit or made a record but that he neither possessed or transported any liquor.”

Bound by these statements it cannot be said that in view of Noble’s defense, that he could be not guilty of all the offenses with which he was charged in the criminal action and yet be guilty in the present case of transporting liquor with the intent to defraud the United States of the

taxes due on it, especially in view of the fact that the Government did not produce any additional evidence showing that he had liquor in his possession in this car, but relied upon the same evidence that was had in the criminal action; not granting the contention of the Government that they were not bound by the acquittal in the criminal action, and, in view of the further fact that the present action is simply a penalty following and dependent upon Noble's guilt in the criminal action and not a totally different case, thus it seems clear that the plea of *res adjudicata* should not be denied.

The only other possible contention that could be raised that the plea of *res adjudicata* could have no merit would be because of the fact that the criminal action was brought under the National Prohibition Act while this action was brought under the Internal Revenue Laws. Granting that the government has a right to do this, although it is the contention of the appellant that it does not have this right, it would seem apparent that the plea of *res adjudicata* would avail the appellant even under these circumstances. For, in order to defraud the United States the taxes due it upon distilled liquors as provided under the Internal Revenue Act, it must be shown that the claimant of the property had distilled spirits in the car upon which a tax was due the United States. That is the basic fact, for without any distilled spirits

in the possession of the claimant there can be no taxes due the Government, not only is it a basic fact in the action of *rem* under Section 3450 of the Internal Revenue Laws, but it was also the basic fact under the criminal proceedings for it was apparent from the Court's instructions that the sole question in that case was whether or not Noble had any distilled spirits in his car.

Assuming but not granting the contention as the Court does in the case of *United States vs. One Essex Touring Car*, 266 Fed. 138, that the Volstead Act does not repeal Section 3450 of the Internal Revenue Laws as is also held in the case of *United States vs. One Cole Aero Eight (Supra)* where the Court says on this point as follows:

"Hence Section 25 does not repeal Section 3450 no more than a previous Statute (R. S. 3296 Com. St. 6038), which was also enacted subsequent to Section 3450 and is also broad enough to include the latter elements and the conclusion is that Section 3450 is 'existing law' within the language and intent of Section 35 of this Act."

So it can be said in view of the language of these cases that the National Prohibition Act is broad enough to include Section 3450 and that the latter is a necessary complement to it, in other words the Statutes are not wholly inconsistent with one another but both deal with the same subject matter. While different evidence might be required to convict under the two

statutes, yet nevertheless they deal with the same offense, namely having distilled spirits, and, in this respect under either of the two Statutes it must be shown that Harvey Noble had distilled spirits with him when the car seized. As the Government failed to prove in the criminal action that Harvey Noble had distilled spirits in the car, we think that the Court was bound by the jury's decision in that action. The question whether or not a tax has been paid on the liquor is without merit unless it can be shown that the claimant had distilled spirits in the car, and, this the Government has surely failed to do and is bound by the verdict of the jury on that point.

The Government has been accustomed to bring the action for the forfeiture of these cars under Section 3450 of the Internal Revenue Laws simply for the reason that it was easy to obtain a forfeiture of cars under this section as no liens are recognized and, the section also provides for the forfeiture of cars under different offenses besides the transportation of distilled spirits with tax unpaid; while the Volstead Act simply provides for the forfeiture for the one offense of transportation without a permit, and also recognizes liens in the way of mortgages. Thus, the government has a much wider range under Section 3450. Allowing the Government to do this shows what the Courts have clearly recognized that the two Statutes

are interwoven, and it seems to the counsel for the appellant that the language of *Coffee vs. the United States (Supra)* would apply under the circumstances in this case as clearly as though both actions were brought under the Internal Revenue Laws. The Government has the burden of proof of showing that there were distilled spirits in the car and until that is shown the burden is not on a claimant to show that the tax has been paid, and, a mere libel filed on the part of the Government against the car is wholly insufficient without further proof on its part.

II.

That the Court erred in holding that the said Big Six Studebaker Automobile and Accessories were subject to confiscation in the above-entitled case under the Internal Revenue Laws and that Section 26 of the Volstead Act did not repeal Section 3450, of the Internal Revenue Laws, Errors, 6, 7, and 8.

The information in the criminal action against Harvey Noble was filed under the National Prohibition Act charging him with transporting liquor without a permit or making a record thereof in violation of Sections 6 and 10, respectively, of said act. Section 26 provides for the specific method of forfeiture of any vehicle seized in the act of transporting distilled spirits. Section 3450 of the Internal Revenue Laws deals generally and covers goods and

commodities of all kinds upon which there is a tax due and provides for the forfeiture of all articles which contained said commodities either in the manufacturing of the same or which are used in the removal or concealment of said goods. The question arising necessarily as to whether or not Section 26 of the National Prohibition Act repealed Section 3450 at least to the seizure of vehicles which are used in transporting and confiscating liquors certainly seems to the counsel for the appellant to be repealed at least to this extent. The case of *United States vs. One Haynes Automobile*, 274 Fed. 926, decided by the Circuit Court of Appeals of the Fifth Circuit is on all fours with the contention of the appellant, the Court holding that Section 3450 was repealed by Section 26 of the Volstead Act. The facts of that case are directly in point with the issues at hand, except there appears to be no acquittal obtained by person charged in the criminal action, but it is stated that the acts charged to constitute the violation of law are alleged to have occurred since the Volstead Act took effect. The Court saying:

“It is evident that the tax, which is claimed has not been paid, is the double tax and penalty directed by Section 35 of the Volstead Act. Any manufacture, sale, or transportation of liquor for nonbeverage purposes to be legal, must be under a permit as provided by the Volstead Act. The transportation of liquor is clearly one, which if illegal, would

violate the Volstead Act, and would subject the vehicle to forfeiture according to the provisions of that act. It is not, therefore, to be assumed that Congress intended to provide for the forfeiture of vehicles under Section 26 of the Volstead Act, with its provisions for preserving the rights of third parties, and, still leave them subject to be forfeited under the more drastic provision of Revised Statutes 3450."

As the grounds upon which the libel of the Government is based is that the automobile seized was used in the removal of distilled spirits upon which there was a tax due and assuming that there was liquor in the car, the tax due to the United States on the same, would be the customs duty since the liquor was made outside of this country, it being Sandy MacDonald Scotch Whiskey and James Burrough Limited Dry Gin (See Trans. p.-61-62). When the various Federal Statutes herein involved governing the enforcement of a customs law passed by Congress, the importation of intoxicating liquors for beverage purposes into the United States was lawful, and, the only object of the Statutes were to protect the revenue by providing a method for the collection of duty imposed upon merchandise including such intoxicating liquors so imported.

The enactment of the Volstead Act marked a complete departure by the Government from its former policies with respect to the importation of intoxicating liquors for beverage purposes.

By that Act such importation for such purposes were absolutely forbidden. It is clear, therefore, that thereafter there could be no intoxicating liquors imported for beverage purposes on which any customs duty should be paid. It follows that any Statute then in force providing for such payment or entry, together with any Statutes imposing or prescribing the mode of enforcing penalties for the failure to make such payment of entry were thus repealed by necessary implication.

U. S. vs. One Packard Motor Truck
284 Fed. 394;

U. S. vs. 2000 Cases, etc. 277 Fed.
410, C. C. A. 4th;

Ketchum vs. U. S. 270 Fed. 416, C. C.
A. 8th;

Read vs. Thurmond 269 Fed. 252, C.
C. A. 4th;

U. S. vs. Yungenovich 65 Law Ed.
1043;

U. S. vs. One Paige Automobile 277
Fed. 524.

Furthermore aside from the Volstead Act and even if the custom laws regulating the importation of intoxicating liquors for beverage purposes were not repealed by that Act, the same result would follow from the inconsistency between such custom laws and the Eighteenth Amendment of the Federal Constitution prohibiting the importation of intoxicating liquors into the United States for beverage purposes. Regardless of the other considerations, as the law referred to, impliedly recognized and as-

sumed as legality of such importation when accompanied by compliance of regulations thereby prescribed, every such statute, if attempted to be applied to the importation of beverage intoxicating liquors is clearly unconstitutional and void.

It no doubt will be contended by the Government that the presence of intent to defraud as under Section 3450 of the I. R. L. and the absence of that intent under Section 26 of the Volstead Act, prevents an implied repeal. Yet in the Yungenovich case (Supra) Section 3257 was held repealed. That section provided punishment for a distiller who attempted to defraud the Revenue Laws. The comparable section of the National Prohibition Act punished a distiller regardless of his intent and provided a lessor punishment. We can see no possible distinction, in this respect, between the comparison made by the Supreme Court of a Statute directed against these distillers who attempted to defraud the Revenue Laws with a later Statute against all distillers; and the comparison here to be made of a Statute against those who transport with intent to defraud the Revenue Laws and a later Statute against all who transport. This distinction as to intent to defraud the Revenue Laws, did not preserve Section 3257, and it cannot preserve Section 3450 in that extent to which 3450, is subject to the same fatal comparison. The contention that

Section 3450 punishes by forfeiture in all cases, and Section 26 punishes only in case there is specific arrest and conviction for an underlying offense, we think is a distinction without a difference. The fact that the second Statute covers the same act and provides a smaller penalty leads to the conclusion of an implied repeal; so when the second Statute covers the same act as a reason for confiscation, but provides some exemptions from condemnation we have a complete analogy to a lesser penalty. When we have a statute complete in itself which makes a doing of certain prohibited acts therein specified a crime, and, such statute also prescribes the punishment to be inflicted in case of violation, and, such statute makes no reference to other statutes, it is going far to say that we may go to some other prior statute which in general language provides for the forfeiture to the United States of all instrumentalities used in the commission of offenses of that character.

- The Goodhope 268 Fed. 694;
- In Re Food Conservation Act (Supra);
- U. S. vs. One Ford Automobile 262 Fed. 374;
- Reo Atlanta Company vs. Stern 279 Fed. 423;
- Reed vs. Thermond (Supra);
- U. S. vs. One Haynes Automobile (Supra);
- U. S. vs. Windham 264 Fed. 376.

If the forfeiture is in force it is in nature of and in fact amounts to the imposition of an added punishment not found in or provided for in the statute which makes a doing of prohibited act a crime and which also specifies punishment to be inflicted in case of violation. So far as the punishment for violation of laws is concerned it must be presumed the one prescribed in the statute is the only one exclusive of all others, and, a punishment prescribed in other statutes, even a general one, for bringing in merchandise contrary to law cannot be resorted to.

U. S. vs. Dowling 278 Fed. 630;
In Re: Food Conservation Act
(Supra);
U. S. vs. One Ford Automobile 262
Fed. 374;
U. S. vs. 90 Demijohns Case No.
15887, 27 Fed. Cases 167;
Bags of Sugar Case No. 14324, 24
Fed. Cases 505;
U. S. vs. Puhac 268 Fed. 392.

The case of Lewis vs. U. S., 280 Fed. 5, C. C. A. Sixth, is on all fours with the case in hand and holds in a very able opinion by said Court that Section 3450 of the Internal Revenue Laws is superseded by the National Prohibition Act so far as the vehicles used in transportation or concealing intoxicating liquors manufactured and intended for beverage purposes are concerned, The Court saying:

“By the system existing when Section 3450

was adopted it was contemplated that a specific tax was levied by the law upon all distilled spirits, and, that this tax must be paid by attaching to the container advanced paid Revenue stamps, with which it was a duty of every manufacturer to provide himself. The whole system, the automatic imposition of the tax and the advanced or simultaneous payment therefor, was abolished by the new law. Stamps were expressly forbidden, and, so far as we observed no other payment of tax was provided if the liquor was for beverage purposes.

"It is not easy to see how a duty to pay a tax can arise if there is no way in which it can be paid and no officer authorized to receive it; nor how, lacking any law which makes it a duty to pay, there can be an intent to defraud the law by not paying, or by acts which would be an aid of an intent not to pay. The only tax which is now ever imposed against such liquor, and is also made payable, is that double tax which the collector specifically assess in any case where evidence of an unlawful manufacturer comes to his notice. The very provision that he shall assess a double tax may be said to imply that one-half of it is in place of that original tax which would have accrued under the old law, but which never had accrued under the new, and which therefor must be specifically levied. Of course, after such an assessment there could be an intent to defraud the United States out of such tax; but that case is not before us. Without doubt the power to tax illicit liquor in spite of the absolute prohibition against the manufacture continues unimpaired; but the actual existence of any such tax until it is specifically assessed may well be thought to be inconsistent with the abolition of all existing methods

of payment and the substitution of no other method."

Again in the case of *United States vs. Two Thousand Cases, etc.* 277 Fed. 410, The Court says:

"The Congress, if it had so desired could have taxed prohibited liquor and the Supreme Court has so stated . . . the question here, therefore, is not one of the power but of legislative intent . . . We are satisfied that the National Prohibition Act was not intended as a taxing measure in respect of intoxicating liquors for beverage purposes, but being a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes, it has erected its own machinery to accomplish the desired results."

This Court has held in *Farley vs. United States* 269 Fed. 721 that the National Prohibition Act covered the whole field of carrying on the business of a retail liquor dealer and therefore repealed the earlier Internal Revenue Law punishing for carrying on this business without paying a tax, and this in spite of the provisions of Section 35. The reason for the conclusion was that the entire subject matter of criminal liability for the manufacturer or traffic in intoxicants was covered by the latter Statute with penalties different from those obtaining under the old Statute, the Court saying:

"As we have seen the Prohibition Act by the third Section of title two inhibits in the most comprehensive terms possible the manu-

facture of or traffic in intoxicating liquors except as authorized by the act and an infraction of its mandate in this respect is rendered criminal by Section 29 so that here we find the entire subject matter of criminal liability for such manufacture or traffic in intoxicants covered by the latter Statute and with different penalties from those obtaining under the old Statute.

“Section 35.—The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

“This amounts to a saving clause for the prosecution under previous Statutes of offenses committed prior to the time the present act became effective. Subsequently thereto, the ‘existing laws’ applicable are obviously those established by the prohibition act, especially where inconsistent with or repugnant to prior Statutes relating to the subject.”

With our own circuit court holding this general view of the prohibition act regarding its effect upon existent laws, it seems clear that this view would support the contention of the appellant regarding Section 3450 of the Internal Revenue Laws that this action should have been brought under Section 26 of the Prohibition Act, if at all, and appellant’s contention being further supported by the Circuit Court of Appeals in the 2nd, 4th, 5th, 6th, 7th and 8th Districts as shown by the cases cited (*Supra*).

III.

Discussing errors nine, ten and eleven to the

effect that the court erred in not holding that the liquor, if any, was of foreign manufacture and therefore, not taxable under title three of the prohibition act.

According to the testimony in the case the distilled spirits involved were manufactured outside of the United States (See Trans. p. 61 and 62). That being so, there clearly could be no tax due to the government under the theory that they might have been manufactured in the United States before the prohibition act went into effect, and, therefore taxable under the Internal Revenue Laws because first, the labels on the bottles showed conclusively as to the place where it was manufactured, the whiskey in Scotland, and the gin in England, respectively, second because of the long space of time between the date as to when the Prohibition Act was passed and the time when this action was filed. On this basis the case of *Payne vs. United States* 279 Fed. 112 can be distinguished, in which it was held that the transportation occurring only a few days after the National Prohibition Act took effect and there being nothing to indicate, but that the taxes might have been due upon the distilled spirits at the time that the said act went into effect, and, it not appearing but that they might have been manufactured in an industrial plant and taxable under title three of that act, and therefore, Section 3450 of the Internal Revenue Laws could

be invoked to cause the forfeiture of the car.

Here the Court finds that the alleged whiskey and gin was of foreign manufacture and the space of time after the National Prohibition Act was effective, tends to indicate conclusively that these distilled spirits could not have been in the country at the time that the said act went into operation, and therefore, there could not be any taxes due upon it under the Internal Revenue Laws. The labels on the bottles show conclusively that it could not have been manufactured in this country so as to have been taxable under title three of the Prohibition Act which would allow the Government to invoke the aid of Section 3450 of the Internal Revenue Laws in obtaining forfeiture of the vehicle used. In the light of the most favorable angle contended for by the government it can only be said that this seizure arose under the National Prohibition Act, and therefore, the Government has no right to invoke the aid of Section 3450 of the Internal Revenue Laws, but instead should have brought this libel under the Prohibition Act; that being true the acquittal of the defendant, Harvey Noble, is conclusive under Section 26 of the said National Prohibition Act to cause the car to be returned to him by the Government.

Wherefore, appellant respectfully submits that the judgment of the District Court be re-

versed and that the car seized in this action be returned to its true owner and claimant, Charles Zuckerman,

FREEMAN, THELEN & FRARY,
Solicitors for Intervenor and Appellant.

IN THE
United States Circuit Court
of Appeals

For the Ninth Circuit

ONE BIG SIX STUDEBAKER AUTO-
MOBILE, TOOLS AND ACCESSOR-
IES, AND HARVEY NOBLE,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN L. SLATTERY,
United States Attorney,

RONALD HIGGINS,
Assistant United States Attorney,

W. H. MEIGS,
Assistant United States Attorney,
Attorneys for Defendant in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ONE BIG SIX STUDEBAKER AUTO-
MOBILE, TOOLS AND ACCESSOR-
IES, AND HARVEY NOBLE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This is an action in rem brought November 26, 1921 (Tr., p. 2), by the United States under Section 3450 R. S. to forfeit One Big Six Studebaker Automobile driven by one Harvey Noble for its use on the 8th day of October, 1921, wrongfully and unlawfully to remove, deposit and conceal distilled spirits upon which

an Internal Revenue tax was imposed, to defraud the United States of said tax. Libel of Information was filed November 26, 1921 (Tr., p. 2), Petition to Intervene (Tr., p. 17), and Answer in Intervention (Tr., p. 19), were filed December 21, 1921, by one Charles Zuckerman claiming to be the mortgagee of said automobile. On the 22nd day of November, 1921 (Tr., p. 52), an information was filed against said Harvey Noble under the National Prohibition Act for transporting intoxicating liquors on the 8th day of October, 1921, without obtaining a permit or keeping a record. Thereafter (Tr., p. 58), on the 7th day of March, 1922, said Harvey Noble upon trial by jury was acquitted of said charge, and on the 14th day of March, 1922 (Tr., p. 24), said Charles Zuckerman as defendant and intervenor filed a supplemental answer, incorporating therein as additional grounds of defense, *res adjudicata*, by virtue of the acquittal of said Harvey Noble.

At the trial of the action it was stipulated between counsel appearing for the United States and Charles Zuckerman as defendant and intervenor, that the cause be submitted to the court without jury (Tr., p. 35), upon the evidence in the trial of United States vs. Harvey Noble, with the addition of such evidence as either side wished to offer (Tr., p. 36). Additional undisputed proof on behalf of the United States established that the distilled spirits involved in the case were of foreign manufacture without stamps or anything indicating payment to the United States of Internal Revenue tax, and that no permit had been granted to transport the same or that any tax had been paid the

customs for importation of them (Tr., pp. 61 to 65, inclusive). Defendant and Intervenor submitted proof showing him the mortgagee of said car (Tr., pp. 65 and 66).

By written opinion filed May 25, 1922, Court found in favor of the United States (Tr., pp. 37 to 46, inclusive).

Stripped of verbiage the said defendant and intervenor as Plaintiff in Error, sets up as error (1) that court failed to hold the acquittal of said Harvey Noble *res adjudicata* of this action, and (2) the holding that Section 3450 R. S. has not been repealed by the National Prohibition Act.

There has been no appearance by Harvey Noble in this action and he is not a party to this appeal. He made default (Tr., p. 68).

For convenience, Plaintiff in Error will be referred to herein as Appellant and the United States as Plaintiff.

ARGUMENT.

I.

Before discussing the authorities bearing upon the questions to be decided, a review and differentiation of certain provisions of the National Prohibition Act and Section 3450 R. S. (6352 C. S.) will lead to a clearer understanding of the matters before the court.

Section 6 of Title II of the National Prohibition Act prohibits the transportation of intoxicating liquors without a permit from the Commissioner of Internal

Revenue. Section 10 thereof provides that there can be no lawful transportation of intoxicating liquors, even after permit, unless a permanent record is kept showing amount and kind in detail, names and addresses of consignor and consignee and the time and place of transportation. Section 26 thereof provides, any officer discovering an unlawful transportation of intoxicating liquors by means of an automobile, shall at the time seize the car, arrest and charge the offender with such violation, and only upon conviction of the offender can the car be forfeited, and out of the proceeds of the sale must be paid all liens of intervening lienors, except those having knowledge of the unlawful use of the car. Section 29 thereof makes it a misdemeanor punishable by a fine not exceeding five hundred dollars for a violation of any of the above sections.

Section 3450 R. S. (Sec. 6352 C. S.) reads:

“Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed
* * * are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax or any part thereof,
* * * shall be forfeited; and in every such case
* * * and every vessel, boat, cart, carriage, or *other conveyance* whatsoever, * * * used in the removal or for the deposit or concealment thereof respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to

defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. * * *

It is to be seen that the National Prohibition Act and Section 3450 R. S. (Sec. 6352 C. S.) are two distinct and separate laws; the one ostensibly in furtherance of the 18th amendment to the Constitution of the United States to prevent the transportation and use of intoxicating liquors for beverage purpose, and the other to protect the revenue. This latter is more evident when considered in the light of sub-section (a) Section 600 of the Act of February 24, 1919 (40 Stat. 1057) establishing a tax on imported distilled spirits.

Before there can be a forfeiture under the National Prohibition Act, there must have been a seizure of the car at the time of the transportation of intoxicating liquors without a permit or record, and a conviction of the guilty party, and in the distribution of the proceeds from the sale of the forfeited property, the claims of innocent lienors are recognized and paid, before the government is entitled to any of the receipts.

Not so, however, with a forfeiture under Section 3450 R. S. (Sec. 6352 C. S.); this is strictly an action in rem under an act passed as a protection to the revenue and not in behalf of the morals of the nation, and despite the innocence of the owner or lienor, after proper proceeding the libelled article is sold; the conviction of a violator is not a condition precedent and the car is subject to forfeiture, whether seized at the time of the unlawful use or not.

The trial of United States vs. Harvey Noble being had under the National Prohibition Act, and this action having been instituted under Section 3450 R. S., the provisions of two different laws are invoked, based on different ideas, passed for dissimilar purposes and involving different kinds of issues, proof and procedure. In the transportation of intoxicating liquors, there could be a violation of both, of one or neither of these laws. Harvey Noble could have been charged by separate information or indictment under both these laws and tried at one or different times, or the offenses could have been consolidated in two or more counts in one information or indictment (Sec. 1024 R. S.) and the defendant put upon trial thereunder. A conviction or acquittal of one offense would not be *res adjudicata* or double jeopardy and a bar to trial and conviction of the other. Likewise the plaintiff herein cannot be estopped in this action on the grounds of *res adjudicata* or double jeopardy from proceeding against the offending automobile under Section 3450 R. S. simply because of the acquittal of Harvey Noble under the National Prohibition Act.

Burton vs. U. S., 202 U. S. 344, 378, 379, 380 and 381;

Ebeling vs. Morgan, 237 U. S. 625.

“A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the

other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Excerpt from opinion in *Morey vs. Commonwealth*, 108 Mass., 433, and quoted approvingly and adopted by Chief Justice Fuller, *Carter vs. McClaughry*, 183 U. S., 365, 395. See also, *Bens vs. U. S.*, 266 Fed., 152; *Moorehead vs. U. S.*, 270 Fed., 210, 212; *U. S. vs. Butt*, 254 U. S., 38, 42.

In *Gavieres vs. U. S.*, 220 U. S., 338, an appeal was taken from conviction under penal code of Philippine Islands of charge of insulting a public official in the exercise of his office by word of mouth and in his presence, because defendant had previously on account of same words and conduct been convicted of disturbance charge under an ordinance of the City of Manila. On page 342 the court says:

"It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different."

Then follows an approval of words of court in *Morey vs. Commonwealth*, 108 Mass., 433, previously quoted. Court further says on page 343:

“In *Burton vs. U. S.*, 202 U. S., 344, 381, *Bishops Criminal Law*, Vol. 1, Sec. 1051, was quoted with approval to the effect, ‘jeopardy is not the same when two indictments are so diverse as to preclude the same evidence from sustaining both.’ In that case this court said, speaking of a plea of *autrefois acquit*, ‘It must appear that the offense charged,’ using the words of Chief Justice Shaw, ‘was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they be connected in fact.*’”

On page 345 this conclusion is reached:

“In the case at bar the offense of insult to a public official, covered by the section of the Philippine code, was not within the terms of the offense or prosecution under the ordinance. *While it is true that the conduct of the accused was one and the same, two offenses resulted, each of which had an element not embraced in the other.*” See *Diaz vs. U. S.*, 223 U. S., 442.

Breaking and entering a post office and committing a larceny therein constitutes two offenses under Sections 190 and 192 P. C. *Morgan vs. Devine*, 237 U. S. Prosecution and trial of one does not bar prosecution and trial of the other.

“But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with requisite criminal intent and are such as are made punishable by the act of Congress.” Id. p. 640.

“As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this court has settled that the test of the identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes.” Id. p. 641.

Acquittal upon an indictment under the immigration laws, charging an alien with importation of an alien woman into the United States for immoral purposes, does not stand as *res adjudicata* for the deportation of the defendant under the same laws for the same offense. *Lewis vs. Frick*, 233 U. S., 291.

Section 281 Kelley's Federal Prohibition Digest (1922), on pages 61 and 62, under the title “Jeopardy,” reads:

“The test when double jeopardy is claimed is whether the same evidence is required to sustain the same charges. If not, then the fact that both charges grow out of one transaction does not make a single offense when two are defined by statute.”

U. S. vs. Sacein Rouhana Farhat, 269 Fed., 39;

Morgan vs. Devine, 237 U. S., 632.

“A conviction or acquittal on one indictment is no bar to a subsequent conviction and sentence upon another unless the evidence required to support the conviction upon one of these would have been sufficient to warrant conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes and if each statute required proof of an additional fact which the other does not, an acquittal or conviction under the same statute does not exempt the defendant from prosecution and punishment under the other.”

Gavieres vs. U. S., 220 U. S., 338;
 Carter vs. McClaughry, 183 U. S., 365;
 Burton vs. U. S., 202 U. S., 344;
 Kelley vs. U. S., 258 Fed., 392;
 Manning vs. U. S., 275 Fed., 29.

Conviction and judgment against the person for the crime not prerequisite to action of forfeiture. Dobbins vs. U. S., 96 U. S., 395, 399.

“Cases arise, undoubtedly where the judgment of forfeiture necessarily carries with it, and as part of the sentence, a conviction and judgment against the person for the crime committed; and in that state of pleading it is clear that the proceeding is one of criminal character; but where the information, as in this case, does not involve the personal conviction of the wrongdoer for the offense charged, the remedy of forfeiture claimed is plainly one of civil nature, as the conviction of the

wrongdoer must be obtained if at all, in another and wholly independent proceeding. 1 Bish. Cr. L., 6th Ed., Sec. 835 note 1; U. S. vs. Three Tons Coal, 6 Bliss., 379." Id. p. 399.

"Forfeiture in many cases of felony, did not attach at common law where the proceeding was in rem until the offender was convicted, as the Crown, Judge Storey says, had no right to the goods and chattels of the felon, without producing the record of his conviction; but that rule, as the same learned magistrate says, was never applied to seizures and forfeitures created by statute in rem, cognizable on the revenue side of the Exchequer Court, for the reason that the thing in such a case is primarily considered the offender, or rather that the offense is attached primarily to the thing, whether the offense is *molum prohibitum* or *molum in se*; and he adds, that the same principles apply to proceedings in rem in the admiralty. The Palmyra, 12 Wheat., 1." Id. p. 399. Goldsmith, Jr.—Grant Co. vs. U. S., 254 U. S., 505.

"But the merchandise is to be forfeited irrespective of any criminal prosecution * * * No condition is attached to the imposition of the forfeiture." *Origet vs. U. S.*, 125 U. S., 240, 246.

Counsel for appellant place chief reliance upon the case of Coffey vs. U. S., 116 U. S., 436, as basis for the effort to reverse Judge Bourquin under the theory of *res adjudicata* or double jeopardy. However, that case is easily distinguishable from the present one. A

close examination shows this case not only does not hold contrary to the decision of the District Court but actually supports it. The Coffey case, *supra*, establishes the rule that where an acquittal has resulted in the trial of a defendant under a charge of violating an internal revenue statute, such result is *res adjudicata* of a subsequent action in rem brought under the same law to forfeit the property of the defendant involved in the transaction, the "issue" or "act or fact denounced" having been tried in the criminal proceeding.

Counsel for appellant (Brief Pl. in Error, p. 7), at the outset, in attempting to show the Coffey case *supra*, in point, beg the question with a large "If," saying:

"If both the criminal action and the action in rem against the car had been brought under the Internal Revenue Act, the case of Coffey vs. United States, 29 Law Ed., 681, would be conclusive."

The facts in the present case do not conform to those in the Coffey case *supra*, hence the holding in the latter is not to be taken as controlling herein.

Quotation of Counsel (Brief Pl. in Error, pp. 8 and 9), from the Coffey case (*supra*), is not exact, the language of the court on page 443 (*supra*), is as follows:

"It is true that the proceeding to enforce the forfeiture against the res named must be a proceeding in rem and a civil action, while that to enforce the fine and imprisonment must be a

criminal proceeding, as was held by this court in *The Palmyra*, 12 Wheat., 1, 14. Yet, where an issue raised as to the *existence of the act or fact* denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a *particular person*, that judgment is conclusive in favor of *such person*, on the subsequent trial of a suit in rem by the United States, where, as against *him*, the existence of the *same act or fact* is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem."

The foregoing is the meat of the ruling by the court, and an analysis will show that it does not govern the matter at hand. The "act or fact denounced" and tried in *U. S. vs. Harvey Noble* was a violation of the National Prohibition Act for transporting intoxicating liquors without permit and keeping a record. Judgment of acquittal negatives the "existence" of the allegation. But the "act of fact denounced" in the libel proceeding was the use of a Studebaker automobile by Harvey Noble to remove, deposit and conceal distilled spirits in fraud of the revenue. "Existence" of such allegation was not tried in the criminal proceeding, and the record shows no acquittal of such charge; hence no *res adjudicata*.

To invoke *res adjudicata* or former jeopardy on grounds of acquittal in criminal action, the "judgment of acquittal" must have been "rendered in favor of a *particular person*," and only "is conclusive in favor of *such person*," on "the subsequent trial of a suit in rem,"

where "the existence of the same act or fact is the matter in issue," as cause for forfeiture. Charles Zuckerman was not the "particular person" or "such person" in the action of U. S. vs. Harvey Noble.

Quoting again from Coffey case (*supra*), p. 443:

"When an acquittal in a criminal prosecution in behalf of the government is pleaded, or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same."

It follows then with the Coffey case (*supra*), as authority, that the parties must be the same. Here the parties are not the same. Harvey Noble never made appearance, and Charles Zuckerman came in voluntarily as intervenor; the parties herein are the United States and Charles Zuckerman; identity of parties being non existent, appellant cannot logically contend for the application of *res adjudicata* on the strength of the above decision.

Further in said case, it is announced:

"This doctrine is peculiarly applicable to a case like the present, where in both proceedings, criminal and civil, the United States are the party on one side and this claimant the party on the other. (Different in present case.) The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute and foundation of any

punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis for any statutory punishment denounced as a consequence of the existence of the facts."

Again it is easily observed that the opinion of the said Coffey case cannot be used in the adjustment of the present matter. The intervenor here, unlike the claimant there, was not a party to the criminal action, and the criminal and libel actions here not based on the same law as there. Intervenor can no more logically set up *res adjudicata* here, than he could former jeopardy were he to be charged criminally, either under the National Prohibition Act or Section 3450 R. S., which could be done because it was ascertained at the trial of *U. S. vs. Harvey Noble* that intervenor was in the car with Noble at the time of the alleged offense (Tr., p. 73).

"The person punished for the offense may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent." *Ariget vs. U. S.*, 125 U. S., 240, 246.

This decision destroys contention of counsel for appellant in respect to *res adjudicata* and jeopardy, and a reading at the bottom of p. 246 and top of p. 247, shows court wavering on the soundness of Coffey

vs. U. S. (supra). People vs. Snyder, 86 N. Y. Sup., 415; Micks vs. Mason, 108 N. W., 707, 11 L. R. A., N. S., 653; Kansas vs. Rooch, 112 Pac., 150; 31 L. R. A., N. S., 670.

Counsel for appellant seem to loose the point in Chantangco vs. Abaroa, 218 N. S., 479 (Br. Pl. in Er. p. 11). Point in that case is, that where statute creates civil liability for malicious destruction of property, and makes conviction in criminal action condition precedent to recovery, such prerequisite must exist before civil action is allowed. Acquittal of defendant on criminal charge barred civil action. Without statutory obstruction action could have been maintained regardless of the criminal case.

II.

For support of assignment of errors 6, 7 and 8 (Tr., pp. 4 and 5), Counsel for Plaintiff in Error argue (Appellant's Brief, pp. 22 to 31 inclusive), that Section 3450 R. S. has been repealed by the National Prohibition Act and cite authorities in support thereof and quote therefrom. The question of the repeal of Section 3450 R. S. as contended by Plaintiff in Error is now before this Honorable Court in the case of E. P. McDowell, Doing Business Under the Firm Name and Style of E. P. McDowell Motor Company, Plaintiff in Error vs. The United States of America, Defendant in Error, case No. 3865, being an appeal from the United States District Court for the District of Montana. Reference is respectfully made to the brief of the Defendant in Error in that action. Ful-

some discussion of this point is not deemed necessary. Courts are not in agreement upon this question. The following decisions hold that Section 3450 R. S. has not been repealed by the National Prohibition Act:

U. S. vs. One Essex Touring Auto (D. C. Ga.), 260 Fed., 746; 266 Fed., 138;

U. S. vs. One Haynes Auto (D. C. Fla.), 268 Fed., 1003;

U. S. vs. One Bay Horse et al (D. C. Ga.), 270 Fed., 590;

U. S. vs. One Cole Auto (D. C. Mont.), 273 Fed., 934;

Duval vs. Dyche (D. S. Ga.), 275 Fed., 440;

U. S. vs. One Essex Touring Auto (D. C. Ga.), 276 Fed., 28;

The Tuscan (D. C. Ala.), 276 Fed., 55;

Payne vs. U. S. (5th C. C. A.), 279 Fed., 112;

Reo Atlantic Co. vs. Stern (D. C. Ga.), 279 Fed., 422;

U. S. vs. One Buick Roadster (D. C. Mont.), 280 Fed., 517.

III.

In discussion of assigned errors 9, 10 and 11 (Tr., p. 94) (App. Brief, pp. 31, 32 and 33), Counsel for Plaintiff in Error assume the repeal of Section 3450 R. S. and conclude that any tax levied upon the intoxicating liquors, i. e. distilled spirits (Tr., pp. 61, 62 and 63), involved in this case must have been imposed or due under title three of the National Pro-

hibition Act. It is the contention of Defendant in Error that Section 3450 R. S. has not been repealed and that the tax levied and due upon said liquors are provided specifically for by sub-section (a) of Section 600 of Act of Congress, February 24, 1919, 40 Stat. 1057.

WHEREFORE, Defendant in Error respectfully submits that the judgment of the District Court be affirmed.

JOHN L. SLATTERY,
United States Attorney,

RONALD HIGGINS,
Assistant United States Attorney,

W. H. MEIGS,
*Assistant United States Attorney,
Attorneys for Defendant in Error.*

United States
Circuit Court of Appeals

For the Ninth Circuit.

S. L. SELIG, as Claimant of the Gas Power Boat
"EAGLE," Her Engine, Apparel, Tackle
and Furniture, and J. R. HECKMAN,
Stipulator,

Appellants,

vs.

MARY L. BRINDLE, as Executrix of the Estate
of ALEXANDER BRINDLE, Deceased,
Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court
for the Territory of Alaska, Division No. 1.

FILED

DEC 18 1922

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

S. L. SELIG, as Claimant of the Gas Power Boat
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In the District Court for the Territory of Alaska,
Division Number One.

IN ADMIRALTY—No. 493—KA.

MARY L. BRINDLE, Executrix of the Estate of
ALEXANDER BRINDLE, Deceased,
Libellant,

vs.

Gas Power Boat "EAGLE," Her Engine, Tackle,
Apparel and Furniture.
S. L. SELIG, Claimant.

Statement.

Time of Commencement of Suit:

August 13, 1921.

Names of Parties to Suit:

Alexander A. Brindle, libellant; Mary L. Brindle, Executrix of the Estate of Alexander Brindle, deceased, libellant by substitution; Gas Power Boat "Eagle," her engine, tackle, apparel and furniture, respondent; Steve Selig, claimant.

Names and Addresses of Counsel:

Chas H. Cosgrove, Ketchikan, Alaska, for libellant; Winter S. Martin, 703-4-5 New York Block, Seattle, Washington, for respondent and claimant.

Dates of Filing Pleadings:

Libel filed August 13, 1921; claim of owner filed September 12, 1921; answer of claimant filed September 12, 1921 (subsequently stricken); claim of owner filed September 13, 1921; exceptions to sufficiency of libel filed September 13, 1921; answer of

claimant filed December 17, 1921; amended libel filed January 19, 1922.

Attachment of Property and Proceedings:

Monition and attachment against respondent gas power boat "Eagle," etc., was issued out of said District Court on the libel of libelant therein on August 13, 1921, and said gas power boat "Eagle," etc., was attached by the United States Marshal for the District of Alaska, Division Number One, under said monition and attachment on August 16, 1921, and released into the custody of claimant on the same day on the giving of a bond for said release in the sum of \$8,000.00; and thereafter on September 13, 1921, claimant duly filed his claim for said vessel together with a stipulation for costs in said cause, in the office of the Clerk of said court.

The time when the trial of said cause was had was January 19th to January 23d, inclusive, 1922.

The name of the Judge hearing the same was the Honorable Thomas M. Reed, Judge of said District Court.

The trial of said cause on the merits was in open court and said cause was not referred to a commissioner or commissioners.

Final decree was entered in said cause on June 3, 1922.

Notice of appeal was filed in said cause on June 13, 1922, and service admitted by proctor for libelant on June 12, 1922.

Citation on appeal to the U. S. Circuit Court of Appeals was issued out of the District Court for Alaska, September 18, 1922, and service admitted

by proctor for libellant on September 26, 1922.
[1*]

Interrogatories Propounded by Claimant to Libellant.

To the Honorable Judge of the District Court for
the First Division of Alaska, Sitting in Admiralty:

Comes now the claimant and respondent in the above-entitled cause and propounds the following interrogatories to the libellant to be answered under oath, in manner and form to comply with the Admiralty Rules and practice, to wit:

1. State when and where the gas boat "Wildwood" was built, giving the specific date and year.
2. Give a full and complete description of her engine, with its capacity, speed, size, etc.
3. Describe fully the kind and character of electric lighting or other system employed and in use upon the "Wildwood" at and prior to the collision, giving the details of the same, candle-power of the lights, voltage, revolutions and capacity of generator if such was used on board the "Wildwood," and if no generator was used, give full details of the electric light plant, storage batteries, voltage capacity, etc.
4. State the original cost of the "Wildwood's" hull when completed before the installation of her engines, machinery, tackle and apparel.
5. State the costs of her engines, batteries and electrical equipment after installation, giving the

*Page-number appearing at foot of page of original Certified Transcript of Record.

itemized details as far as possible or original cost together with cost of installation. [18]

6. State the fair market value of the "Wildwood" immediately before the collision.

10. State fully in what particulars libellant suffered a loss of \$1500.00, or any other sum as a result of loss of fishing profits, use of the vessel, or demurrage by reason of the collision.

11. State under what kind of a charter-party, lease or agreement the "Wildwood" was working at the time of the collision, for whom, whether one or more persons, with their names and addresses.

12. Give the names and addresses of the shippers and charterers or consignors, by whom the "Wildwood" would have been employed during the remainder of the fishing season, together with a statement showing how, and in what particulars the gasoline boat "Wildwood" would have worked throughout the remainder of the fishing season, at what rate of hire or under what kind of charter or shipping arrangement.

13. State fully the extent of the injury and damage to the hull, machinery and equipment of the "Wildwood," giving an itemized statement thereof in the following particulars; injury and damage to the planking timbers and hull, injury and damage to the [19] engine, shafting and other machinery on board, injury to the boat's equipment, tackle, apparel and furniture together with the cost of replacement in each instance.

14. State how soon after the collision the work of repair and replacement was undertaken, how

long it would have taken to complete it, and when it was completed if at all.

15. Furnish respondent paid vouchers or receipted bills, showing disbursements made by *respondent* to restore the "Wildwood" to her condition before collision.

16. State when the "Wildwood" left port before the collision and whether she had run continuously after leaving port up to the time of collision.

Filed in the District Court, District of Alaska, First Division. Dec. 17, 1921. J. H. Dunn, Clerk. By A. W. Fox, Deputy. [20]

Answers to Interrogatories Propounded by Claimant to Libellant, Pursuant to Interrogatories Filed by Claimant to Libellant in the Above-entitled Cause, and Stipulation Filed Herein.

Alexander Brindle, libellant in the above-entitled cause, appears, and first being duly sworn to tell the truth, the whole truth and nothing but the truth, answers said interrogatories as aforesaid, as follows, to wit:

ANSWER TO INTERROGATORY No. 1

The only thing I can give is Ketchikan, Alaska, in 1906.

ANSWER TO INTERROGATORY No. 2.

24-27 Horsepower Heavy Duty Eastern Standard, three cylinder, four cycle, 320 Revolutions Per Minute.

ANSWER TO INTERROGATORY No. 3.

Two 6-volt Champion storage batteries, one Wizard Mageneto, one Auto-sparker, one switch-board, spark coil, electric side-lights, 4 candle power, with masthead lights and range light kerosene.

ANSWER TO INTERROGATORY No. 4.

Between \$1300.00 and \$1400.00.

ANSWER TO INTERROGATORY No. 5.

The Engine \$1880.00 after installation; batteries and electrical equipment \$137.00

ANSWER TO INTERROGATORY No. 6.

\$3500.00 [21]

ANSWER TO INTERROGATORY No. 10.

Agreement with H. M. Sawyer whereby libellant was to purchase and handle a portion of the catch of his fish-trap; also a tentative agreement with the Wards Cove Packing Company to the same effect, whereby libellant would, within the next sixty days, have cleared a minimum of \$1500.00, on account of the generous run of all kinds of fish, and the demand for the same.

ANSWER TO INTERROGATORY No. 11.

Freighting fish to Prince Rupert from Port Conclusion and Ketchikan, by the pound and piece, for J. S. Killean and A. W. Brindle.

ANSWER TO INTERROGATORY No. 12.

We were going to buy fish independently and take them to Prince Rupert. The fish were running good and we could have made good money in buying fish and taking them to Prince Rupert. We had offers to buy all kinds of salmon, including

Dog salmon, for delivery at Prince Rupert at prices that would have netted us at least \$600.00 to \$700.00 per month. For example, an independent trip netted us \$650.00, the trip occupying us less than one week's time.

ANSWER TO INTERROGATORY No. 13. [22]

Libellant answers Interrogatory No. 13 with the following itemized statement made by ship carpenter who was asked to make a survey and estimate of the cost of placing the boat in as good condition as she was prior to the collision. Included in this statement is the list of the following personal items and repair of engine, including loss of items and cost of overhauling the engine and replacement of apparel and furniture destroyed or wrecked:

New stern post, 8"x10"	\$10.00
New keel 8"x10"x40"	32.00
Planked halfway back 11¼" thick,	
960 feet	96.00
Decking 2"x5", 720 feet	72.00
Oakum and cotton	36.00
Nails and bolts	25.00
Iron bark guards	15.00
Rail, Oak, 3"x3" timbers	32.00
Paint, cement and pitch	18.00
Pilot house	250.00
Labor	672.20
Shaft Log	50.00

\$1328.30

Overhauling engine and new bronze

shaft200.00

ANSWER TO INTERROGATORY No. 14.

All we did was to salvage the engine, and the estimated time to repair the hull would be seven to eight weeks. No effort was made on the work of repairing or replacement, due to lack of funds on the part of the libellant.

ANSWER TO INTERROGATORY No. 15.

No vouchers for repairs made, other than those occasioned [23] by the salvage of the engine. Wreck of the hull now on the beach at Ketchikan, where libellant will be glad to show it to the respondent and his attorney.

ANSWER TO INTERROGATORY No. 16.

The "Wildwood" left Port of Ketchikan at 7:00 P. M. on July 23, 1921, and ran continuously, except for the period of two minutes when the engineer stopped the engine to tighten a loose wire, at a point one and one-half hours' sailing distance prior to reaching the point of collision.

The foregoing answers as given to the interrogatories on file herein are true, as affiant verily believes.

ALEXANDER A. BRINDLE.

Subscribed and sworn to before me this 15th day of December, 1921.

[Notarial Seal] CHAS. H. COSGROVE,

Notary Public in and for Alaska.

My commission expires March 1, 1923.

Filed in the District Court, District of Alaska,
First Division. Dec. 19, 1921. J. H. Dunn, Clerk.
By A. W. Fox, Deputy. [24]

Amended Libel.

To the Honorable ROBERT W. JENNINGS, Judge
of the District Court for the First Division of
Alaska, Sitting in Admiralty:

The libel and complaint of Alexander Brindle,
owner of the Gas Power Boat "Wildwood,"
whereof Lee Ryan is master, against the Gas Power
Boat "Eagle," whereof ——— was formerly mas-
ter, and J. E. Anderson is at present master, her
engine, tackle, apparel and furniture, in a cause
of collision, civil and maritime, alleges as follows:

I.

That the libellant, at the time of the happening
of the damage and injury hereafter mentioned was
and still is the owner of the gas power boat "Wild-
wood," of the burden of about thirteen tons, said
vessel being tight, staunch and strong, and well
and sufficiently manned and equipped, and pro-
vided with tackle, apparel and furniture.

II.

That on the night of Saturday, the 23d day of
July, 1921, about 10.20 o'clock P. M., the said gas
power boat "Wildwood" was proceeding down
through Revilla Gigedo Channel, and on a voyage
from Ketchikan, Alaska, to Prince Rupert with
a load of fresh fish; and about 500 yards off Mary

Island Light. The water was calm with no wind, and the night was clear and dark.

III.

That the said gas power boat "Wildwood," under the circumstances stated in the next preceeding article, was going at the rate of about seven (7) knots per hour, with all her power signal lights set, of the character and construction and in the position prescribed by the Acts of [26] Congress. Her master was at the wheel.

When at the point above described the master of said "Wildwood" observed a dark object off the port bow some distance away. The said object at first was taken for either a log or a shadow. As the object approached, and when about some sixty (60) feet distant, it was discovered that it was a boat, and afterwards ascertained to be the gas power boat "Eagle," and that the said gas power boat carried no lights, which made it impossible to determine, until almost in contact, whether she was a boat or a floating log, or merely a shadow. When about 60 feet distant said gas power boat "Eagle" flashed on her electric lights, and not until then was it determined that the oncoming body was a ship.

When observed at about a distance of 60 feet away, and having flashed on her lights as afore-said, instead of turning to the right, as the rules of the road required, she turned to the left and crashed into the "Wildwood" hitting the "Wildwood" in the stern, on the port quarter, making

it impossible for the gas power boat "Wildwood" to avoid collision.

IV.

That by reason of the default of said gas power boat "Eagle" in exhibiting no lights, as aforesaid, the master of said gas power boat "Wildwood" was not able to avoid collision, although he threw his wheel over, heading the said gas power boat "Wildwood" to the right, as required by the rules.

That in colliding with the said "Wildwood," the said gas boat "Eagle" struck her upon her stern, on the port quarter, about eight (8) feet from her stern, crushing the entire stern and causing her to sink to the water's edge immediately.

The crew of the said gas power boat "Wildwood" with great difficulty succeeded in getting two lines aboard the gas power boat "Eagle," and lashed the said "Wildwood" to the said "Eagle," and thus kept the "Wildwood" from sinking. [27]

V.

That the said collision was caused solely by the gross carelessness and negligence of the master and crew of the said gas power boat "Eagle" in not keeping a proper lookout as aforesaid, and especially in not having lights set in the proper manner and of the dimensions required by law, and was not attributable to any carelessness or negligence of the master or crew of the said gas power boat "Wildwood."

VI.

That immediately after said collision as aforesaid, the gas power boat "Wildwood" was brought to

Ketchikan, Alaska, where she was placed upon the beach on July 24, 1921, where she has been since the events hereinbefore narrated, and where she now is.

That due to lack of funds on the part of the libellant, she has not been repaired, and libellant says that by reason of said collision she was damaged to the amount of \$2500.00.

Libellant further says that the value of the cargo of fish aboard said gas power boat "Wildwood" at the time of said collision was about \$1000.00; that a part of the same was salvaged, but that the loss to the libellant, by reason of said collision and damage and costs of salvage was the sum of \$300.00, and equipment lost, amounting to the sum of \$534.50 additional.

Libellant further says that at the time of her collision she was engaged in the fish business, being used in the matter of transporting fish on commission, and also in the purchase and sale of fish, plying between the Ports of Ketchikan, Alaska, and Prince Rupert, B. C.; that the run of fish was very strong, and at the rate of profits said boat was showing at said time in said business, if continued from said date through the balance of said fishing season, to wit: About September 30, 1921, libellant would have netted the sum of at least \$1500.00, but that by reason of said collision and damage aforesaid, and his inability, on account of lack of funds, to make the necessary repairs, and libellant's inability to obtain another [28] boat of equal capacity and serviceability, said libellant

was completely put out of business, resulting in his damage as aforesaid in the sum of \$1500.00.

VII.

Libellant further said that the said gas power boat "Eagle" is a domestic vessel, running out of the port of Ketchikan, Alaska; that she is now in the District of Alaska and within the jurisdiction of this Court, and that all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable Court.

WHEREFORE, the libellant prays that process of attachment, in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said Gas Power Boat "Eagle," her engine, tackle, apparel and furniture, and that the said J. E. Anderson, master, and all other persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters articulantly propounded, and this Honorable Court shall be pleased to condemn the said gas power boat "Eagle," her engine, tackle, apparel and furniture, and that the same may be sold to pay the damaged claimed and stated therein, and that the Court will grant to the libellant such other and further relief as in law and justice he may be entitled to receive.

ALEX A. BRINDLE,

Libellant.

United States of America,
Territory of Alaska,—ss.

Alexander Brindle, first being duly sworn, says:

That he is the libellant named herein and who executed the foregoing libel, and that the statements therein contained are true, he verily believes.

ALEX A. BRINDLE.

Subscribed and sworn to before me this 11th day of August, 1921.

[Notarial Seal not affixed]

CHAS. H. COSGROVE,

Notary Public in and for Alaska.

My commission expires March 1, 1923.

Filed in the District Court, District of Alaska, First Division. Jan. 19, 1922. J. H. Dunn, Clerk.
By —————, Deputy. [29]

Answer to Amended Libel.

To the Honorable Judge of the District Court for the First Division of Alaska, Sitting in Admiralty:

The answer of Steve Selig, master and owner of the gas boat "Eagle" in a cause of collision, civil and maritime, alleges and avers as follows, to wit:

I.

That the gas boat "Eagle" is a gasoline power boat 63 feet long, 14.7 feet beam, 6.8 feet in depth and of 27 tons net thereabouts documented and licensed in the Port of Ketchikan, Alaska, whereof Steve Selig, claimant, and the respondent in the above-entitled cause is the owner and master.

II.

In answer to paragraph II of the libel respondent admits that on the night of Saturday the 23d day of July, 1921, at or about the time alleged in the

libel, the Gas Power Boat "Wildwood" was proceeding down through the Revillagigedo Channel on a voyage from Ketchikan, Alaska to Prince Rupert with a load of fresh fish. Respondent denies that the gas power boat "Wildwood" was about 500 [31] yards off Mary Island, but on the contrary alleges and avers the fact to be that she was approximately three-quarters of a nautical mile off of Mary Island Light. Respondent admits that the sea was calm with no wind and admits that the night was dark, but not entirely clear all of which will be more fully answered in the allegations to follow.

III.

Answering paragraph III of the libel, respondent admits that the gas power boat "Wildwood" was under way steering a southerly course, but is without sufficient information and has no knowledge as to her speed at and prior to the time of the collision. Respondent denies that the "Wildwood's" signal lights were set and denies that they were of the character and construction and in the position prescribed in the Acts of Congress. Respondent admits that the "Eagle" and "Wildwood" collided together in the Waters of Revillagigedo Channel about three-quarters of a nautical mile off of Mary Island Light. Respondent denies all and singular each and every allegation in paragraph III of the libel except as the same is herein specifically admitted.

IV.

Answering paragraph IV of the libel, respondent

admits that the Gas Boat "Eagle" and "Wildwood" collided together in the Waters of Revillagigedo Channel off Mary Island Light. Respondent denies all and singular the remaining allegations in said paragraph except that two lines were run from the "Eagle" to the "Wildwood," and so fastened to the "Wildwood" as to hold and keep her afloat.

V.

Replying to paragraph V of the libel, respondent denies all and singular each and every allegation therein, and particularly [32] denies all manner of negligence in the matter of said collision, all of which will more fully appear in respondent's affirmative answer hereinafter set forth.

VI.

Respondent is without sufficient information or knowledge to form a belief as to the truth of the matters and things propounded and alleged in paragraph VI of the libel and therefore deny the same. And respondent particularly denies that irrespective of any damage to the "Wildwood" that her cargo suffered no damage and that she sustained no other or further damage in the matter of loss of fishing profits or demurrage as alleged in the libel, or in any manner at all.

VII.

Respondent admits paragraph VII of the Libel.
AND FURTHER ANSWERING RESPONDENT ALLEGES:

I.

Respondent alleges that as hereinbefore alleged

the gas power boat "Eagle" is a gasoline power boat, of the dimensions and descriptions hereinabove set forth, engaged in the fishing business out of the Port of Ketchikan, Alaska.

II.

That on the 23d day of July, 1921, said gas boat "Eagle," under the command of her master and owner, said Steve Selig, was returning from the Port of Prince Rupert in British Columbia to her home port in Ketchikan aforesaid without cargo on board. That her course was approximately northwest half west magnetic according to the Government Chart from Tree Point to Mary Island, across the waters of Revillagigedo Channel. That the night was very dark with more or less haze upon the water. That said Channel at the point [33] opposite Mary Island Light is approximately four nautical miles in width. That Mary Island lies to the westerly side of the channel while the mainland of Alaska lies immediately to the east about four nautical miles distant. That said mainland of Alaska opposite Mary Island Light and for some miles northerly and southerly is very high and mountainous. That immediately north of Mary Island, approximately five nautical miles distant is Point Alava, which is the most southerly point of Revillagigedo Island. That said southerly part of said Island at Point Alava is also high and mountainous. That the effect of this high and mountainous land at the southern end of said Island and upon the mainland hereinbefore described is to darken the surface of the waters

lying between Mary Island, the mainland and Point Alava. That said mountains cast a dark and heavy shadow over said waters so that a vessel following the course which the "Eagle" was running upon the night of the collision was headed directly into said darkness and shadow area. That the haze upon the waters hereinbefore mentioned and the dark shadows of the mountains were such as to render the water area at or near the point of collision very dark and to deprive the navigator of the "Eagle" of the natural light of the heavens upon a dark night. That there was no moon to furnish any additional light and the stars were partially obscured.

III.

That the "Eagle" is equipped with regulation electric masthead, range and side lights. That these lights are furnished with electric current from the generator attached to the main engine. That they are sufficiently powerful to be seen the distance required by the collision rules and statutes and were at the time of the collision burning brightly. That the said gas boat [34] "Eagle" was proceeding at a speed of about eight miles per hour bound for the Port of Ketchikan aforesaid.

IV.

That in addition to the master and owner there were serving on board at said time two men, viz: Joe Olander, and Al Ames. That at and immediately prior to the time of collision said Al Ames was at the wheel in the pilot-house and said Olander was on watch acting as lookout and watch-

man. That these men kept a sharp and vigilant lookout and were at the time of and immediately prior to the collision carefully and skillfully steering the gas boat "Eagle." That no lights were observed upon the sea ahead or upon either bow of the "Eagle," as she proceeded upon her said course until she had reached a point approximately three-quarters of a mile east by north from Mary Island Light, when her helmsman and lookout observed the sudden appearance of a dim light bearing about two points on the starboard bow and approximately fifty or sixty feet distant.

That almost immediately after seeing the said light the hull of the "Whitwood" came out of the darkness and crossed the "Eagle's" bow in such close proximity as to render collision unavoidable. That the elapsed time from the moment the said dim light was first observed by the wheelman and lookout on the "Eagle" until the collision occurred did not exceed five or six seconds.

That immediately upon seeing the said dim light which was afterwards ascertained to be the mast-head light of the gas boat "Whitwood" the master and crew of the "Eagle" immediately reversed the "Eagle's" engines and drove them full speed astern. That the "Eagle's" gasoline engine and reverse gear were in first-class condition at the time of collision and when reversed by her master [35] and crew had the effect of instantly reducing her speed and of causing her to stop going ahead within the time elapsing from the moment the dim

light was observed and the coming together of the vessels.

That the situation of peril which was suddenly and without warning forced upon the "Eagle" and her master and crew was one where said vessel, her master and crew were required to act *in extremis* and the sudden peril and excitement prevented the giving of any danger or other signal. That the time in which to act was so short that while the failure to give whistle signals did not affect and could not in any manner have affected the situation which the said colliding vessels were in prior to the coming together of said vessels and the collision was unavoidable and inevitable from the time said dim light was first observed by the "Eagle" and her crew.

That as respondent afterwards ascertained, the light first observed and which suddenly appeared in the darkness ahead of the "Eagle" upon her starboard bow was the masthead light of the Gas Boat "Wildwood." That no other lights were burning or showing upon the "Wildwood." That she had no side-lights and no range light; and there was no other indication by whistle, signal, light or sound to indicate the presence of the "Wildwood" or her close proximity to the "Eagle." That respondent verily believes that when the master of the "Wildwood" first sighted the "Eagle" that he immediately placed his wheel hard aport and swung very quickly to starboard so as to place the "Wildwood" squarely across the course and bow of the "Eagle." That the said gas boat "Wild-

wood" is a small boat, approximately thirty feet long, which was at the time of collision loaded and lying deep in the water. That her [36] short length and load enabled her to answer her helm immediately and that by reason thereof when her wheel was placed hard aport she swung immediately to starboard and across the "Eagle's" bow with such speed and so quickly as to prevent any action on the part of the master and seamen on the "Eagle" to prevent a collision.

V.

That in all respects the master and owners of the gas boat "Wildwood" were solely and entirely at fault. That their failure to exhibit lights required for gas boats operating within the inland waters of the United States, and the failure to sound a whistle or other signal upon the said dark and obscure waters of Revillagigedo Channel, and their attempt to make a port to port passing thereby crossing the "Eagle's" bow and course, when if she had maintained her course and speed she would have made a starboard passing with safety, was the sole, proximate and efficient cause of the collision without which the same would not have occurred. That the gas boat "Eagle" was saved from a serious collision and damage only by the fact that she was at the time of the impact going full speed astern.

VI.

That the master and crew of the said gas boat "Eagle" immediately placed lines around the hull of the "Wildwood" and made them fast to the

“Eagle,” thereby preventing her foundering in the waters of the Revillagigedo Channel. That the men on board the “Wildwood” were taken on board the “Eagle” and said “Wildwood” was towed to the Port of Ketchikan by the “Eagle.” That all and singular the respondent rendered such aid as was necessary and requisite to save the “Wildwood” and her crew in the circumstances of the collision. [37]

VII.

That the “Wildwood” was placed upon the beach at Ketchikan and was by the action of the “Eagle” saved for her owner. That she has as respondent verily believes sustained no other or greater damage than \$500.00, which expenditure may be necessary to restore the “Wildwood” to her former condition. That respondent verily believes and alleges the fact to be that the “Wildwood” sold her cargo of fresh fish to the same advantage and profit as she would have but for the collision and that she suffered no loss by reason thereof, nor did she suffer any loss by reason of her failure to continue in the fishing business during the summer of 1921.

WHEREFORE the respondent having fully answered all and singular the allegations of the libel as required by the rules of practice and admiralty procedure, prays that said cause against the “Eagle” may be dismissed and that he have and recover his costs, fees and disbursements in said cause.

WINTER S. MARTIN,
Proctor for Respondent and Claimant.

State of Washington,
County of King,—ss.

Steve Selig, being first duly sworn, on oath says:
That he is the respondent and claimant in the
above-entitled action; that he has read the fore-
going answer, knows the contents thereof and
believes the same to be true.

STEVE SELIG.

Subscribed and sworn to before me this 7th day
of December, 1921.

[Notarial Seal] WINTER S. MARTIN,
Notary Public in and for the State of Washing-
ton, Residing at Seattle.

Filed in the District Court, District of Alaska,
First Division. Dec. 17, 1921. J. H. Dunn, Clerk.
By A. W. Fox, Deputy. [38]

Order for Substitution of Libellant.

It appearing that Alexander A. Brindle, libellant
in the within entitled action, has died, and that
Mary L. Brindle has been duly appointed executrix
of the estate of Alexander A. Brindle, deceased,
and that letters testamentary thereon have been
duly granted to her as such executrix by the Pro-
bate Court at Ketchikan, Alaska, and that she has
filed her oath therein and is now the duly qualified
and acting executrix of such estate,—

IT IS ORDERED that this action be, and the
same is hereby revised and continued in the name

of Mary L. Brindle, executrix of the estate of Alexander A. Brindle, deceased, as libelant, and that the said executrix be and she is hereby substituted as libelant in the place and stead of said Alexander A. Brindle, deceased, and that such revival and continuance be without prejudice to any of the proceedings already had in this action.

Dated at Ketchikan, Alaska, this 3d day of June, 1922.

THOS. M. REED,
Judge.

Filed in the District Court, District of Alaska, First Division. Jun. 3, 1922. J. H. Dunn, Clerk.
By _____, Deputy.

Entered Court Journal No. D, page 258. [40]

Opinion.

CHARLES A. COSGROVE, Proctor for Libellant.

WINTER S. MARTIN, Proctor for Claimant and Respondent.

On July 23, 1921, a collision occurred in the waters of Revillagigedo Channel, off Mary Island, in the waters of the Territory of Alaska, between the gas boat "Eagle" and the gas boat "Wildwood," in which the "Wildwood" was damaged. Alexander Brindle, the owner of the "Wildwood," libeled the "Eagle" on August 25, 1921, alleging that the collision occurred through the sole fault of the "Eagle," and on September 10, 1921, Steve Selig appeared and filed his claim to the gas boat

“Eagle” and answer to the libel. Pursuant to stipulation of proctors on either side, an amended answer to the libel was filed by the claimant on December 17, 1921, denying all the material allegations of the libel and averring that responsibility for the collision lay with the gas boat “Wildwood.” On January 19, 1922, at the beginning of the hearing, an amended libel was filed by the libellant, under stipulation of proctors for the respective parties, in which it was alleged that the collision was the fault of the “Eagle,” in that she carried no lights and did not exhibit any lights until within about sixty feet distant from the “Wildwood.” Testimony was taken before the court on January 19, 20, and 21, 1922, and the case continued until February 20, 1922, for the submission of certain depositions on behalf of the claimant. [55]

The uncontradicted testimony shows that on the night of July 23, 1921, the gas boat “Wildwood,” being of thirteen tons gross measurement and of a length of forty-five feet, was proceeding in a southerly direction on a voyage from Ketchikan, Alaska, to Prince Rupert, British Columbia, loaded with a cargo of fresh fish; that her crew consisted of one Leo F. Ryan, as master, and Harold Brindle as engineer. The weather was good, the sea calm and the night clear and bright, as the moon was nearly full and only occasionally obscured by clouds. The testimony of Ryan, the master of the “Wildwood,” is to the effect that when opposite Mary Island Light, at about the hour of 10:20 P. M., he observed, at a distance of from a

hundred to 125 feet, off the port bow, a black object, which he took to be a log, but that almost immediately thereafter lights were flashed on, showing the masthead and the two side-lights of a boat which he afterwards found to be the gas boat "Eagle"; that on observing the lights, he immediately put the helm hard to port to sheer off to starboard; that the oncoming boat also turned in the same direction and struck the "Wildwood" on the port quarter, about eight feet from the stern, causing the damage complained of.

The "Eagle" was in charge of the claimant Selig, who, some twenty minutes before the collision, had gone between-decks, preparatory to retiring. He left, as helmsman, one Al. Ames and also one Olander in the pilot-house, and the only testimony on the part of the claimant as to the facts leading up to the collision was that of Ames. It seems that the testimony of Mr. Olander, who was with Ames in the pilot-house of the "Eagle," could have been procured by the claimant, as his whereabouts was known until six weeks prior to the time of the hearing, but was not produced at the hearing and his, Olander's, testimony is entirely lacking, although it would have been very material.

[56]

Ames testified that he was a deckhand on the "Eagle"; that he had worked on different boats—three or four days altogether; that he was at the wheel of the "Eagle" at the time of the collision and Olander "was there; just around there." He "guessed he was on lookout." Selig was down

in the engine-room, according to the testimony, and he turned the lights on on the "Eagle" about twenty minutes before the collision, when Ames took the wheel. The "Wildwood" was fifty or sixty feet away when he first observed her. He though he saw one white light which was dim, about seven or eight feet above deck. When he saw the "Wildwood," he put the wheel hard aport, turning his boat to the right, or starboard. When he saw the "Wildwood," she was two points off the starboard bow. Taking the testimony of these two witnesses as to the position of the two boats just prior to the collision, it would appear that the "Wildwood" had the right of way, as the position of the "Eagle" from the "Wildwood" was approximately two points off the port bow of the "Wildwood," and the position of the "Wildwood" from the pilot-house of the "Eagle" was two points off the starboard bow of the "Eagle."

According to this testimony, both boats turned to the starboard—the "Wildwood" toward the Mary Island shore, lying to the westward, and the "Eagle" to the eastward, toward the open channel. I, however, cannot come to the conclusion that the "Eagle" turned to the starboard, or toward the open channel. According to the undisputed testimony, the "Wildwood" was struck on her port quarter about eight feet from the stern, smashing her timbers and cutting her down below the water-line, and if the "Eagle" had promptly put her helm to port, she would have cleared the "Wildwood" or at least struck her only

a glancing blow. In confirmation of this conclusion is the testimony of the two witnesses, David [57] Kinyon and his wife, who had a plain view of the collision from the shore of Mary Island. These witnesses were the assistant lighthouse-keeper and his wife, and both gave a clear, detailed, unbiased account of the accident and their testimony is entitled to the highest credit. Mrs. Kinyon, wife of the assistant keeper of the lighthouse, stated that she, on the evening of July 23d, at about ten o'clock, saw a light proceeding south, and, thinking it the mail boat, watched it. She first saw it about a mile away, the weather being fine and apparently clear. There was a moon at times and it was quite light. As she entered the porch of her house, she saw a green light and from the arrangement knew it was not the mail boat which she was expecting. After that she and her husband heard the exhaust of another boat, coming from a southerly direction and looked for its lights, but could not see any, though they could hear the exhaust distinctly and she could distinctly see the lights on the south-bound boat. On the north-bound boat she could see no light, but could hear the exhaust distinctly. Yet the north-bound boat was traveling at full speed. She observed the boats for many minutes, because she considered that they were headed for each other and she expected a collision. A few minutes before the collision, the north-bound boat flashed on her lights and, when she struck, Mrs. Kinyon observed three lights—a red light, a green light and a white light

on the north-bound boat. She said, "It seemed to me that the helmsman just momentarily, before they struck, must have directed his course directly toward us; it seems to me that he threw his boat to the port. As to the south-bound boat, I could only see the white light, because the green light had been shut out, she being south of us. But I seen the green light and the white [58] light prior to that time." When they collided, they were from the shore, from the beach, not over five hundred feet. On her cross-examination, Mrs. Kinyon testified that the south-bound boat was closer in to shore than the north-bound boat and that the collision occurred about seven hundred feet from where she was standing on the shore, and further, on direct examination, she testified that the interval between the flashing on of the lights on the north-bound boat and the collision was not more than five seconds—that "it was such a short time there was no time for thinking." David Kinyon, the assistant lighthouse-keeper, corroborated his wife in every particular as to there being no lights on the north-bound boat. He picked her up with the glasses and observed her for about four minutes and saw her flash on the lights not more than two seconds before the collision. On cross-examination he said he first saw a red and white light and then, two seconds later, saw the green light when she turned toward the shore, and said, "She headed toward shore and came around quick."

From this testimony, which so clearly detailed the circumstances of the collision, I can come to no other conclusion than that the south-bound boat; that is, the "Eagle," was traveling at full speed without lights, at any rate up to within a very few seconds of the moment of collision. The lighthouse-keeper says two seconds; his wife says five or six, but that she could not estimate the interval because it was so short there was not time to think.

The testimony of Ames is to the effect that he first saw the "Wildwood" when she was fifty or sixty feet off—a distance which, if the boats were traveling at their ordinary speeds, it would have taken them about two seconds to cover. As to the position of the boats, especially from Mrs. Kinyon's testimony, [59] it appears that the "Eagle" was the farther offshore, which corroborates to some extent the testimony of Ryan, the master of the "Wildwood," and Ames on the "Eagle," that they were approaching on an angle, the "Wildwood" being two points off the starboard bow of the "Eagle" and the "Eagle" two points off the port bow of the "Wildwood." I am, therefore, satisfied from the testimony that the "Eagle" did not port her helm and turn to the starboard, as testified by Ames, but that she either kept on her course or turned to port, or inshore toward Mary Island, as testified to by Ryan and by Mr. and Mrs. Kinyon. If the "Eagle" had turned to the starboard, she would have cleared the "Wildwood" or at least have struck her only a glancing blow, and the tes-

timony shows that the impact was almost direct, tending slightly toward the stern of the "Wildwood."

I can, therefore, come to no other conclusion than that the proximate cause of the collision was the negligence of the "Eagle," first, in traveling after nightfall without lights, and second, in not turning to the starboard on discovery of the "Wildwood." The proctor for the claimant, in his very able and comprehensive brief, contends that the "Wildwood" was also at fault in that there was no lookout on the "Wildwood," other than the helmsman in the pilot-house; that the master of the "Wildwood," though having a certificate, was not twenty-one years of age and, therefore, not qualified to act as such, and that when he first discovered the "Eagle" approaching, he was at fault in not signalling as to passing and, therefore, that the damage should be divided.

I am of the opinion, however, that these three contentions cannot be sustained in this case. The helmsman of the "Wildwood" first discovered the "Eagle" at a distance of from a hundred to a hundred and twenty-five feet as a dark object, which he could not identify as a vessel. In space of time, this could have been [60] only four or five seconds, at the most, before the collision. When the lights were flashed on the "Eagle," at the most four seconds only, perhaps less, ensued, before the collision and there was no opportunity to give him the signal. The right of way was with the "Wildwood." The approaching vessel was

off the port bow apparently head on and the obvious thing for the helmsman of the "Wildwood" to do was to immediately turn her to the starboard, and, in a case of extreme danger like this, the omission to signal cannot be considered a fault.

The question of the age of the master of the "Wildwood" cannot be material. The "Wildwood" was a motor boat of class three, of 13 tons burden and about 43 feet in length, and is subject only to the regulations of Sec. 4412, Revised Statutes, as to the passing of vessels; and Secs. 4233 and 4234 relative to lights and so forth; also only while carrying passengers for hire, she is required to be in charge of a person duly licensed for such service (See act of June 6, 1910). It was not necessary, at the time of the accident, that the "Wildwood" should have been in charge of a licensed master, for she was not, at that time, carrying passengers. Moreover, whether it was necessary or not, the master of the "Wildwood" had received his license as such, presumably on the authority of the local inspectors and the owner of the "Wildwood" was justified in relying upon that certificate.

Again, I can discover no negligence or incompetency on the part of the master of the "Wildwood" after the first discovery of the approach of the "Eagle." He acted promptly and did the necessary and obvious thing by sheering off to starboard. The contention of the claimant on this point cannot be allowed.

The third and most serious contention of the respondent is the lack of a lookout other than the helmsman of the "Wildwood." [61] It is a rule that all vessels should have a lookout other than the helmsman and this lookout should be stationed at the bow of the boat, where he can have free and untrammelled vision over the water. This rule is undoubtedly as applicable to the boats of the motor class as to ocean steam vessels.

The Neo. G, 235 Fed. 119.

The failure to keep a lookout is a violation of the general rule to prevent collisions between vessels and nothing can exonerate a vessel from such failure, unless it should appear that the collision would have occurred notwithstanding such failure. The proper place for such a lookout is such a position as will afford a view over the bow of the vessel where the best opportunity is afforded for observation of approaching vessels.

See The Price Oskar, 219 Fed. 483.

The Dedamore, 147 Fed. 884.

Eastern Dredging Company vs. Winnisimmet Co., 162 Fed. 860.

The pilot-house is not the proper place for a lookout, except under such circumstances that it is the only safe place.

See The Tilicum, 230 Fed. 415.

The Otta, 3 Wallace, 269.

However, looking at the situation of the two boats as I find them to have been at the time of the collision, I am inclined to believe that the lack of a proper lookout on the "Wildwood" was not

a contributory cause of the collision. It appears from the testimony that Ryan, master of the "Wildwood," saw a black object which he thought to be a log, about two points off the starboard bow. Mrs. Kinyon also testified that just prior to the collision she saw a black object, which she was unable to identify, but considered it to be a log just prior to the time of the accident. [62] If it were, as Ryan supposes, a log which he saw, he, by keeping on his course, would have avoided it, but when the lights of the "Eagle" were flashed on, it was too late to avoid a collision. The proximate cause of the collision was the lack of lights on the "Eagle" up to the time when too late to avoid the collision. If the lights had been on the "Eagle" at the time when Ryan, the master of the "Wildwood," first saw the black object, the collision would have been avoided. Again, it appears that the "Eagle" was observed by the master of the "Wildwood" at least two or three seconds before the "Wildwood" was observed by the helmsman of the "Eagle" or the lookout, Olander, who was in the pilot-house of the "Eagle." This, although the "Wildwood" had all her lights burning. Thus there can be no comparison as to the vigilance or competency of the lookouts on the two vessels. If, as required by the regulations, the lights on the "Eagle" had been lit and the lookout, instead of being in the pilot-house, had been at the bow of the boat, tending to his duties, a collision would probably have been avoided. Where there has been gross fault shown on the part of one vessel,

it is incumbent on that vessel to show, by clear testimony, a contributing fault on the part of the other vessel. This, under the circumstances of the case, I do not think that the respondent has done. It is also well settled that if a collision is not shown to have resulted because of neglect to keep a proper lookout, the vessel should not be made responsible for the consequences of the collision.

See *The Bluejacket*, 144 U. S. 372.

The New York Cent. No. 22, 135 Fed. 1021.

It further appears from the testimony that the fault on the part of the "Eagle" is so gross and inexcusable that any [63] question of a contributing fault on the part of the "Wildwood" should be resolved in her favor, and I, therefore, must decline to divide the damages arising from the collision.

As to the amount of the damages to which the "Wildwood" is entitled and the cost of repairs to the hull, there is a wide variance in the testimony. The testimony shows that the hull of the "Wildwood" was built in 1906 and that her construction was not balanced, she being weak in the after part. The libellant states that the hull lay for some years under water and that he purchased the hull in that situation for the sum of \$350; that he raised and repaired it at a total cost of \$1,300; that the engine cost him \$1,200, exclusive of repairs, and that the total value of the boat and equipment at the time of the collision was \$3,500. It appears that the hull was in good condition except for minor faults in construction criticised by

the ship carpenters making estimates of the cost of repairs. The cost of repairs was estimated by expert witnesses at from \$500 to \$1,328, and it is very difficult to reconcile this wide discrepancy, depending as it does so much on the view of the several ship carpenters as to what was necessary to place the hull in its former condition. All the carpenters testified that it was very questionable whether the hull was worth repairing. Inman, a witness for the libellant, to whom the libellant submitted the cost of repairs immediately after the accident, seems to have made the most complete examination of the hull and he expresses his conviction that the repairs would cost \$1,328. Other witnesses, on behalf of the respondent, vary from \$500 to \$1,000 in their estimates. [64]

A review of the whole testimony leads me to believe that the hull could be repaired at less cost than Mr. Inman testified to, but that it would be much more expensive than testified to by respondent's witnesses. In my judgment, a fair estimate of the cost of repairs, including the replacement of the keel, would be \$1,050, and that amount shall be allowed against the "Eagle" for repairs to the hull of the "Wildwood." The cargo loss amounts to the sum of \$294.30 and this amount should be allowed. Replacement of the batteries, electrical equipment, boat and other supplies and equipment should be allowed in the sum of \$222.50, being two-thirds of the estimated cost price of the articles lost, on the principle adopted by insurance companies in supplying new material for old material

lost as the nearest approximation possible at the time of the collision. For reconditioning the engine and a new shaft, instead of the old shaft which was bent, there should be allowed the sum of \$200, which is estimated as the amount necessary to place the engine in condition. For demurrage, or loss of the use of the boat, an amount should be allowed, but only for the time requisite to make necessary repairs. The estimates as to the time for the repairs of the boat given by the experts vary, but a reasonable time for the repairs from the date of the collision, including the replacement of the electrical equipment, would be not over four weeks from the time of the accident. It appears that the boat was under charter or hire to one Harold Brindle, who was engaged in buying fish and transporting them to Prince Rupert, Canada, for sale. He testified that the collision occurred in the midst of the fishing season and that the reasonable profits derived from the business in which the boat was engaged under his management during the balance of the [65] season, would have been from \$1,500 to \$2,000 and that the boat's percentage of this would be one-third. Therefore, during the season the boat would have earned approximately \$500, the season lasting approximately sixty days and during the four weeks which the boat would have been out of commission as a result of the accident, the earnings would have been approximately \$240. I therefore consider that \$240 is a reasonable sum to allow for demurrage or loss of the use of the boat until the

time she could again be put in commission, which sum will be allowed, making a total allowance of Two Thousand and Six Dollars and Eighty Cents (\$2,006.80), which sum is the total damage to the "Wildwood" and cargo by reason of the collision.

Let findings and decree be prepared in accordance herewith.

THOS. M. REED,
Judge.

March 27, 1922.

Filed in the District Court, District of Alaska, First Division. Mar. 31, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [66]

Decree.

This cause having come on regularly for trial and hearing before this court on January 19, 1922, at which time said libelant and said claimant herein appeared with their proctors and witnesses, and testimony proffered by both sides was fully heard by this Court, and said cause having been thereupon continued until February 20, 1922, for the submission of certain depositions on the part of the claimant herein, and thereafter said depositions having been filed and fully considered with the rest of the testimony by this Court, and the Court having heard the arguments of the proctors for the respective parties upon pleadings and proofs, and due deliberation being had thereon, and thereafter this Court having fully considered

the same and having duly filed his opinion upon the merits in said cause; and thereafter said Alexander A. Brindle having died and Mary L. Brindle having been duly appointed executrix of the estate of the said deceased by the Probate Court at Ketchikan, Alaska, and on motion having been duly substituted as libelant herein in the place and instead of the said Alexander A. Brindle, deceased, by an order of this Court duly rendered,—

NOW, therefore, IT IS ORDERED, ADJUDGED AND DECREED that said libelant recover of the gas power boat “Eagle,” her engine, apparel, tackle and furniture, the sum of \$2,006.80 and his costs and disbursements herein to be taxed.

And it further appearing that the said gas power boat “Eagle” [67] was released from the attachment in this case by the filing of a bond for the sum of \$8,000.00, with S. L. Selig, and J. R. Heckman as obligators, it is hereby ORDERED, ADJUDGED AND DECREED that the libelant do recover against the said S. L. Selig and J. R. Heckman the sum aforesaid, hereinbefore decreed against said gas power boat “Eagle”; and that the libelant may have his execution against said obligors, or either of them, to enforce the payment of said amount hereinbefore decreed; but said execution shall not issue for the period of twenty days from the date of this decree.

Done in open court this 3d day of June, 1922.

THOS. M. REED,

Judge.

Filed in the District Court, District of Alaska,
First Division. Jun. 3, 1922. J. H. Dunn, Clerk.
By ———, Deputy.

Entered Court Journal No. D, page 259. [68]

Transcript of Evidence.

Tried at Ketchikan, Jan. 19-20-21, 1922.

APPEARANCES:

CHAS. H. COSGROVE, for Libellant.

WINTER S. MARTIN, for Respondent and Claimant.

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Statement of Facts and Bill of Exceptions.

This cause came on regularly for hearing on the merits on January 20, 1922, and said hearing was continued from day to day, Saturday and Sunday excepted, until, and was concluded on, January 23, 1922, before the Honorable Thomas M. Reed, Judge of said District Court, the parties to said cause appearing by their respective proctors and the following proceedings were had and testimony taken, each of the witnesses called at said hearing being first duly sworn to tell the truth, the whole truth and nothing but the truth and the following depositions of witnesses for the respective parties, together with exhibits attached thereto, theretofore duly taken, were severally offered, received and read in evidence, as follows herein.

Mr. Charles H. Cosgrove, of Ketchikan, appeared for libellant;

Mr. Winter S. Martin, of Seattle, appeared for claimant.

And thereupon the libellant, to maintain the issues on his part, introduced the following evidence, to wit: [70]

Testimony of Alexander Brindle, in His Own Behalf.

ALEXANDER BRINDLE, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. C. H. COSGROVE.

Q. What is your name?

A. Alexander Brindle.

Q. Are you the owner of the gas power boat "Wildwood"? A. Yes, sir.

Q. Were you the owner on the 23d day of July last? A. Yes, sir.

Q. That is; 1921? A. Yes, sir.

Q. What is the size of that boat, Mr. Brindle?

A. She is about forty-five over all; she's fourteen gross and thirteen net, I think it is, tons.

Q. What was her physical condition on the 23d day of July? I mean as regards repairs and general efficiency.

A. To my knowledge, she was in first-class shape. She was thoroughly overhauled last spring.

Q. Had she been overhauled recently?

A. In the spring, or during the winter; I forget which.

Q. How old a boat was she?

A. I think she was built in 1906, but I am not sure. I have the papers right here.

(Testimony of Alexander Brindle.)

Q. And she was repaired last when?

A. The last thorough repairing she had, thorough overhauling, was four years ago.

Q. And you know who did that?

A. Yes, sir; it was done over in the shipyard by Mr. Brown, the boat builder. [71—1]

Q. Had she been repaired at all since that time?

A. Just little repairs that she needed. There's always some repairs to make on a boat every year.

Q. You remember who did them?

A. Some we did ourselves.

Q. Has Mr. Inman made any repairs on her?

A. Mr. Inman put an engine in her; overhauled the engine-room floor and things like that.

Q. On the 23d day of July, 1921, what was her value? A. I fix it at \$3,500.

Q. \$3,500? A. Yes, sir.

Q. You remember the collision which happened on the 23d day of July? A. Yes, sir.

Q. Did you see the boat on the 23d day of July?

A. Yes, sir.

Q. When did you next see her?

A. I saw her on the morning of the 24th.

Q. Where?

A. Laying in the creek; on the beach.

Q. Is she there now?

A. No; we hauled her out of the creek a few days afterward. When we could get her out, we floated her on farther down the beach, and put her on the gridiron.

Q. Where is she now?

(Testimony of Alexander Brindle.)

A. She's on the beach in Indian town.

Q. Did you have her repaired? [72—2]

A. No, sir.

Q. Why not? A. I haven't got the money.

Q. Have you had her surveyed? A. Yes, sir.

Q. Have you asked for contracts, for estimates as to what it would cost to repair her?

A. Yes, sir.

Q. More than one? A. Yes; two.

Q. Who were the shipbuilders that you asked to bid?

A. I asked Otto Inman and the shipyard, the Marine Railway.

Q. What were those bids?

A. I think one was in the neighborhood of \$1,300 and the other was \$1,325.28; something like that.

Cross-examination by W. S. MARTIN

Q. Mr. Brindle, this boat was built in 1906?

A. I think about then.

Q. And you acquired her when?

A. About four years ago; four or five years ago.

Q. That's after she was in trouble out there and was on the beach and under water for three or four years.

A. She was tied alongside of the dock and neglected and that's the reason she sunk. She was sunk through neglect; but she wasn't in the water any such length of time.

Q. Well, she was under water for quite a while?

A. She was under water for about two weeks; yes.

(Testimony of Alexander Brindle.)

Q. How much did you pay for her?

A. How much did I pay for her?

Q. Yes.

A. What I paid for the boat? [73—3]

Q. Yes. A. To put her into the water?

Q. No; how much did you pay for her?

A. I paid \$350 for the hull as she stood in the water.

Q. Now, do you say she stood you \$3,500?

A. Yes.

Q. You bought the boat and the engine, just as she stood, for \$350?

A. No; I got another engine.

Q. You took the engine out of her? A. Yes.

Q. You got yourself another engine?

A. Yes, sir.

Q. Where did you get this engine?

A. I got that from a man named Atkinson.

Q. How much did you pay for it?

A. That engine, interest and all, cost me close to \$1,800.

Q. Huh?

A. It cost me close to, in the neighborhood of \$1,800.

Q. Are you sure of that?

A. I've got the actual figures.

Q. Where did the engine come from?

A. It came from the east. [74—4]

Q. Second-hand engine?

A. Yes; from New Jersey.

Q. How much did you pay for that engine?

(Testimony of Alexander Brindle.)

A. In the neighborhood of \$1,800; but I don't know how much it was exactly.

Q. You can't recall, then, just what you did pay?

A. No; I had to pay in installments and pay my interest, too.

Q. That was how long ago?

A. Three years ago, I think. [75—5]

Q. What does the boat stand you, Mr. Brindle?

A. Well, that it is nearly impossible to tell, because it cost me over a thousand dollars—cost me \$1,300 to put her in the water; to get her so that I could put the engine in her.

Q. Well, now, in this case, here is this boat, built in 1906? A. Yes.

Q. And you paid \$350 for the hull. A. Yes.

Q. And you bought this new engine? A. Yes.

Q. That was four years ago. You know, as a matter of fact, that if you had to go and buy a boat, you could pick up a boat for a much more reasonable price than that? A. Not that boat.

Q. Well, you say "not that boat." Now this boat is about how long—forty-five feet over all?

A. Yes, about that.

Q. And her tonnage was thirteen?

A. Thirteen, fourteen.

Q. There have been boats of that sort sold here in Ketchikan in the last two or three years, haven't there, boats of that size— [76—6]

Q. Do you know anything about the "Dixie"?

A. Yes; I know her.

Q. Well, what did the "Dixie" bring?

(Testimony of Alexander Brindle.)

A. I don't know.

Q. You don't know. Well, where do you get the idea that your boat was worth \$3,500?

A. Because that was the going price of boats last year.

Q. Well, you say "the going price of boats." What boat? Can you tell me any boat that brought \$3,500?

A. I can tell you a boat nearly the same size that brought \$5,500.

Q. What boat was that? A. The "Zora."

Q. The "Zora"? A. Yes.

Q. How large is she?

A. I don't know her tonnage; nearly the same size.

Q. How long is she?

A. About the same size boat. She may be a foot or two longer.

Q. Isn't it a fact that the "Zora" is, say 60, 65 feet and your boat forty? A. I think not.

Q. When was the "Zora" built?

A. I don't know.

Q. You don't? A. No.

Q. And so you are estimating, now, the value of your boat to be \$3,500 because some boat that you know of by the name of "Zora"—You don't know how old the "Zora" is? A. No.

Q. Well, wouldn't the age make some difference?
[78—8]

A. Not to me, if she's a good boat.

(Testimony of Alexander Brindle.)

Q. If the "Zora was two years old, or three years old and had a good, staunch hull, launched three years ago, wouldn't that make some difference? And your boat built in 1906. Wouldn't that make some difference in the price? A. Not much.

Q. It wouldn't? A. No.

A. In other words, Mr. Brindle, your estimate of \$3,500 for this boat is merely your own sort of guesswork, so to speak?

A. My own figures; yes.

Q. Your own figures? A. Entirely.

Q. And you can't justify to his Honor; you can't justify that figure by comparison with any boat that you know of, of the same size and capacity, tonnage, build and age? You can't tell now, at this moment, what a boat of that type and size and age, built in 1906, when she was sold to you, what that boat would have brought? A. No.

Q. And you call attention to the "Zora" and you say that your boat is worth as much as the "Zora," and you don't even know when she was built?

A. I say she's a stronger built boat than the "Zora" to-day.

Q. And there is the "Zora," resting on the ways, a new boat, and your boat was built in 1906, and you want us to believe that your boat was worth \$3,500.

NO RESPONSE.

Q. You say it would cost \$1,300 or \$1,400 to repair that boat?

A. That is the estimate given to me. [79—9]

(Testimony of Alexander Brindle.)

Q. Well, now, who gave it to you?

A. The shipyard.

Q. The shipyard. Who?

A. The Marine Railway.

Q. Who is the Marine Railway?

A. Schlothan.

Q. Who is Schlothan? Who is the man?

A. He is the man that owns the railway.

Q. Did Mr. Schlothan give you an estimate?

A. Mr. Schlothan gave me a price.

Q. When.

A. He gave it to me, the first time, about three months ago. Has he given you one since?

A. Not Mr. Schlothan, but his foreman, or his man in charge of the works.

Q. What is his name? A. Thompson.

Q. Mr. Thompson? A. Yes.

Q. George Thompson? A. Yes.

Q. And he gave you the last estimate?

A. Yes, sir.

Q. Mr. Thompson then told you that his price was how much? A. What?

Q. He told you that his price, now, to repair the boat, was what?

A. In the neighborhood of \$1,300.

Q. In the neighborhood of \$1,300.

A. Yes; that's an estimate. [80—10]

Q. You didn't repair the boat? A. No, sir.

Q. You couldn't have repaired it?

A. I could not have repaired it.

(Testimony of Alexander Brindle.)

Q. You say the boat was earning a good deal of money here. In your answer to interrogatory No. 12, you say: "We were going to buy fish independently and take them to Prince Rupert. Fish were running good and we could make good money. We had offers to buy all kinds of salmon, including dog salmon, for delivery at Prince Rupert, at prices that would have netted us at least six to seven hundred dollars a month; for example, an independent trip netted us \$650, the trip occupying us less than one week's time."

You made that statement? A. Yes.

Q. Then that was quite a profitable investment for you? A. How is that?

Q. I say it was quite a profitable investment for you. It was a money-earning concern for you.

A. Oh, yes.

Q. You live here in town? A. Yes, sir.

Q. How long?

A. Oh, about twenty-three, four years.

Q. You are well known here, of course?

A. Pretty well.

Q. Been here over twenty years? A. Yes.

Q. Own your own property, I suppose?

A. Yes.

Q. You realize, of course, that anybody who does work on a boat has an admiralty or maritime lien against the boat? [81—11] A. Yes.

Q. And the boat was valued at \$3,500?

A. Yes.

Q. Will you explain to the judge how you

(Testimony of Alexander Brindle.)

couldn't get credit; why you couldn't have the work done?

A. Because they wouldn't extend the credit.

Q. Oh, they wouldn't? A. No.

Q. Then, notwithstanding your claim that the boat was worth \$3,500, the boat people didn't think she was worth what it would cost to repair her?

A. They wouldn't extend the credit.

Q. They wouldn't extend your credit for \$1,300 on a value of \$3,500? A. No.

Q. How about your own standing in the town? You own your own property? A. Yes.

Q. And lived here twenty years. A. Yes.

Q. But you say you didn't have funds nor couldn't get funds. A. No; I couldn't get funds.

Q. You could, as a matter of fact, if you had funds, you could have the boat repaired in about ten days, couldn't you? A. I believe not.

Q. Well, what did George Thompson tell you?

A. I think he told me seven or eight weeks, it would take to repair her thoroughly.

Q. Seven or eight weeks? A. I think so.

Q. How many men did he figure on using? [82—12] A. I don't know.

Q. You don't know whether it would mean seven weeks using one man or three weeks using four men?

A. I don't know anything about his business at all.

Q. And so you figure that you lost these profits

(Testimony of Alexander Brindle.)

that you claim because you couldn't get your boat repaired? A. Yes.

Q. And you never made any effort at all to get it repaired? A. I certainly did.

Q. I see. What's your boy's name, your son's name? A. Which one?

Q. Well, the boy that was in charge?

A. The boy that was on the boat was Harold.

Q. Harold. Who was in charge with him?

A. A man named Ryan.

Q. Ryan? A. Yes.

Q. What arrangements did you have for working the boat at that time?

A. In what way, do you mean?

A. Well, you were hauling some fish? A. Yes.

Q. Under contract with whom?

A. The boys handled all that; I have nothing to do with it.

Q. Then you don't know anything about it?

A. No. [83—13]

Testimony of A. J. Inman, for the Libelant.

A. J. INMAN, called as a witness on behalf of the libellant, having been first duly sworn, testified as follows:

Direct Examination by Mr. C. H. COSGROVE.

Q. What is your name? A. A. J. Inman.

Q. Where do you live? A. Ketchikan.

Q. How long have you lived here?

A. About thirty-one years.

(Testimony of A. J. Inman.)

Q. What is your business? A. Boat builder.

Q. How long have you been in that business?

A. Well, I have been in it practically ever since I have been in the country, and before I came up here.

Q. Are you in that business now? A. Yes.

Q. Where is your place of business?

A. It's in what they call Indian town, over here on the flats.

Q. Are you familiar with the gas power boat "Wildwood"? A. Yes.

Q. Owned by Mr. Brindle. A. Yes, quite well.

Q. Did you have occasion to make a survey of her? A. Yes.

Q. When?

A. The day it was—the next morning after it was towed in, is the first time I looked at her.

Q. Was she damaged? A. Well, yes; badly.

Q. Will you describe to the Court, please, the condition you found her in? [85—15]

A. Well, I found the boat in the creek, the first time I examined it, laying in the creek, and I hadn't had gum boots on and I couldn't thoroughly examine her at that time, although I went around and cut in from practically back of the pilot-house. Of course the boat wouldn't float without help or assistance. The way she was, she was full of water. Water was running right through her then and from that time on.

Q. Did you subsequently make a thorough survey of her?

(Testimony of A. J. Inman.)

A. I did later on; yes; after they got it out of the creek.

Q. Well, now, just describe what condition you found her in—how she was damaged, where and to what extent.

A. I studied her over for two or three days. Sometimes I figured that it really wasn't worth repairing and then again I figured it could be fixed, but I figured that the expense of fixing her up would practically amount to a new one.

The COURT.—Just tell what damage was done to her.

The WITNESS.—The stern post was knocked out and the planking was cut through—

The COURT.—How far?

The WITNESS.—Clear on down, practically to the keel. Stern post knocked clear out and broke; keel was cracked and the shaft and counter was all knocked out and the keel was cracked and—Did I say the keel was cracked?

The COURT.—Yes.

The WITNESS.—And she was shook from the stem clear; that is pulled from her stem away, from the stem aft—drawed from her stem, drawed back.

The COURT.—Seams all open?

The WITNESS.—Keel was cracked.

The COURT.—How about the seams? All open?

The WITNESS.—Oh, yes; they were all open. You could crawl through the side of her, so far as that's concerned. Timbers were broken. It means new timbers. [86—16]

(Testimony of A. J. Inman.)

The COURT.—How about the ribs?

The WITNESS.—That's what I call the ribs—the timbers.

Q. Did you make an estimate of the cost of repairing it? A. Yes, I did.

Q. What was your figure?

A. Well, I couldn't state just exactly now. I got them in black and white somewhere, unless I mislaid them.

Q. Well, in round numbers?

A. Practically \$1,300; something of that kind.

Q. Thirteen hundred and some odd dollars?

A. Yes.

Q. Was it over \$1,250? A. Yes.

Q. And less than \$1,300?

A. No; I think it was a little over \$1,300. I'm not quite sure. I could find out. I figured up the parts; that is, what parts needed repairing. That is the way I generally do that. Figure on certain parts so much, and so on.

Q. Could you build that kind of hull for \$1,300?

A. Well, I probably couldn't build one exactly like that one for \$1,300, although I could build one of the same size.

Q. Just describe to the Court how she was built.

A. She was built with natural crook yellow cedar timbers, which I wouldn't undertake to build of now, because it is too much work to get them out. You never can get paid for doing that work. When you go out into the woods to get natural crook yellow cedar, it means that it's going to cost

(Testimony of A. J. Inman.)

you money, whereas if you stem the timbers, you do away with that. She is built extra heavy—strong.

Q. Is that the way she was built—extra heavily built? [87—17] A. Yes.

Q. Natural crook yellow cedar.

A. Yes. I know the man that built her. I don't know just what time, but it was something over two years that they were building her.

Q. Do you remember the "Wildwood" about the 23d of July, 1921, the day she was injured?

A. Yes.

Q. What would you consider her value to be at that time, knowing what you do about the boat?

A. Why, I figure the boat was practically as good as new.

Q. Well, what would you consider her value in money to be?

A. Value, well, I never figured anything like that. Now, you see, it's this way. A boat might be valuable to the man that owns it and yet she wouldn't be valuable to me, or something that I owned might be valuable to me and wouldn't be valuable to him. That's a kind of hard thing to say.

Q. Could you tell, from your examination of the boat, where she was hit?

A. Where she was what?

Q. Where she was hit? A. Oh, yes.

Q. Where was that?

A. She was hit on the left side of the cabin.

(Testimony of A. J. Inman.)

Q. On the port side aft? A. Yes.

Q. How far from the stern, about?

A. Between eight and ten feet, I should judge.
I never measured it.

Q. You say you are in doubt as to whether she is a total [88—18] wreck, whether she would be worth fixing up? A. I did.

Q. But that you offered to take the contract for something over \$1,300. A. Yes.

Q. Is she pulled away?

A. From her stem; yes.

Q. From her stem.

A. Practically twisted.

Q. Practically a total wreck?

A. Yes, practically a total wreck. If it was my own, I would consider it so.

Cross-examination by Mr. MARTIN.

Q. You know the man that built this boat?

A. I do.

Q. As a matter of fact, they weren't boat builders? A. No; they were not.

Q. Yes. And they took about two years to build it? A. Yes.

Q. And went out and hunted up,—you say, natural crooks? A. Yes. [89—19]

Q. Natural pieces, bent. A. Yes.

Q. There were no natural bends down aft on the stern, were there? A. Part of them.

Q. Well, where was the last rib? Now, you are talking about natural bends and crooks there.

(Testimony of A. J. Inman.)

Don't you know, as a matter of fact that the last four or five timbers in that vessel, the last four or five ribs, were sawed? Don't you know it?

A. No; I don't know, but then I wouldn't wonder.

Mr. MARTIN.—Probably I better introduce this as an exhibit. I'll offer it now for identification, as Claimant's Exhibit No. 1.

The COURT.—The diagram may be marked Claimant's Exhibit No. 1.

Q. Now, will you look at this and see whether that rough diagram would represent the keel of the vessel and her stern post, in a rough way, for the purpose of illustration to the court. [90—20]

Q. Now, I have written the word "stern post" upon that exhibit and I have written the word "Sampson piece" and I have written the word "keel" there. Would that accurately, to your mind represent a rough illustration of the stern post, Sampson piece and keel?

A. Well, does that represent the outside and the inside, then?

Q. Yes, outside and inside; both.

A. But it don't show the planking. There's the planking, you know.

Q. Oh, yes, the planking comes out here, but that would represent the frame structure, wouldn't it?

A. Yes; that is, the inside.

Q. Now, how about the deadwood?

A. There is no deadwood.

(Testimony of A. J. Inman.)

Q. Inside of that triangle (showing). Point it out to the Court.

The COURT.—I understand.

Q. Between the stern post—for the purpose of the record, between the stern post, keel and Sampson piece there should be something that you call deadwood?

A. There's a timber what is called shaft log.

Q. There is a shaft log and deadwood, too, isn't there? A. No.

Q. You say there isn't, but I say there should be. A. No, not necessarily.

Q. Not necessarily?

A. There's two ways of building those boats. You have a skag boat and a keel boat.

Q. But this is a keel boat. [91—21]

A. This is a keel boat.

Q. There is no deadwood, then, at all?

A. Not that I know of.

Q. Well, we'll say at the point of collision; from the point of collision on aft the ribs were sawed, weren't they?

A. I couldn't say because I hadn't paid so much attention.

Q. Oh; you didn't pay attention to it. Well, now, all those timbers aft were sawed in that boat.

A. But even if they were—

The COURT.—(Interrupting.) Well, just answer the question. [92—22]

Q. As a matter of fact, you could buy that same lumber for \$80, couldn't you?

(Testimony of A. J. Inman.)

A. Laid down in Ketchikan? Q. Yes.

A. No; not unless I ordered it from below. I suppose you might.

Q. Well, that would make a difference of 20 per cent in your price?

A. There would be a difference.

Q. Twenty per cent in the cost of your material?

A. Probably that much in the material.

Q. That is, in the lumber?

A. There's two grades of that lumber; two or three grades of that lumber.

Q. Well, clear fir.

A. Yes; I paid \$80 myself right from Seattle.

Q. So that your estimate of a hundred dollars is a little high, isn't it? A. No.

Q. But you could have bought it for eighty. Don't you know that? A. No, not here.

Q. Coming now to the frames, how many frames?

A. How many frames?

Q. Yes.

A. I don't recollect exactly. [94—24]

Q. Could you estimate that it would cost thirteen or fourteen hundred dollars? A. Yes.

Q. Of course, I want to know what your estimate is based on, but you can't tell me at this time the number of frames.

A. I know they would all have to be renewed from there (indicating) back.

Q. But, how many would that be, sir?

A. Well, it's last July since I took them figures and I don't remember now.

(Testimony of A. J. Inman.)

Q. Decking. Coming now to the item of decking, how much decking would you figure there was?

A. Well, there would be, those timbers should be about not over twelve inches.

Q. Well, how many feet?

A. That would practically mean, I suppose, about ten.

Q. What would you estimate the decking would be; the cost of the decking? A. Cost of that?

Q. Yes. A. That is, the same class of timber?

Q. No; I said decking.

A. The decking. I have got that all figured out and every article but I haven't got it with me.

Q. At this time, sir, you can't tell me what you estimate the decking to be?

A. No; each one separately, I cannot. [95—25]

Q. You figured on a new stern post?

A. I figured on a new keel.

Q. What would you say that would be?

A. A new stern post, six months ago, is quite a while, but I have been doing a lot of figuring on a whole lot more of them.

Q. Would you figure she would need stern guards? A. I sure did.

Q. What would you estimate that at?

A. That's the same thing. There's a regular book of this stuff.

Q. As near as you can recall now, sir; all you can recall is that your estimate was \$1,300 or \$1,400?

A. Something of that kind. I got it all down,

(Testimony of A. J. Inman.)

even right up to the last nail, bolts and nails and all. I always do that.

Q. How long would that job take?

A. If I remember right, they figured five weeks, if I remember right. I have forgotten exactly the time on that. Five weeks for one man, I think it was.

Q. You have forgotten about that? A. Yes.

Q. You figured five weeks for one man? [96—26]

A. That's the way I figured.

Q. You figured on one man?

A. I always figure that way.

Q. Now, Mr. Inman, you are the proprietor, of course, of your own boat-building establishment, repair-shop, how many men do you have working for you?

A. That depends on what comes up. At the present time I ain't got any. There is nothing doing for anybody in the boat line.

Q. Well, last summer—July 23d.

A. Last summer I had one most of the summer. Later on in the spring, for a time I had three.

Q. Now, your estimate on the amount of time was based, of course upon doing it with one man?

A. Yes.

Q. Meaning yourself? A. Yes.

Q. You didn't figure on employing anybody?

A. Myself or another man; either one.

Q. You simply figured on one man?

A. Yes, that's what I figured on.

(Testimony of A. J. Inman.)

Q. Now, you figured out the number of things you would have to put in her, planks, timbers, and so on, doing all that, you figured on one man's time?

A. Yes.

Q. By the way, you say that in your judgment, a new keel was necessary. A. It was.

Q. You didn't have the boat out on the drydock or marine ways to look at the keel, did you?
[97—27]

A. Well, I couldn't see any more right on this floor. You could see it just as plain.

Q. So that here is the boat, canted over on her side and resting over there in the mud—

A. (Interrupting.) Yes.

Q. (Continuing.) and when she's exposed the keel is half sunk in the mud.

A. Oh, no; not over there.

Q. Well, it's down, indented in the mud, isn't it?

A. It's bound to dent in some, I suppose—the weight of it.

Q. Indented in, isn't it?

A. Yes; it must be some.

Q. Now, would you tell us that you looked down—You didn't dig any hole out in under the keel, did you? A. No; I didn't.

Q. And still you estimated that she should have a new keel.

A. I seen it before, when the keel was off the ground; that is the back end of the keel.

Q. What was off the ground?

(Testimony of A. J. Inman.)

A. Yes; in the creek, the keel, back end of it, was off the ground. It was the next day after she was towed in. She hung over a reef. It throwed her stern clear, because a chain was passed underneath it. They fastened the tackle to it to try to float her, but didn't float her. I believe that some other boat come and took her off.

Q. But the keel was open to inspection so that one could go down there and by looking at the edge, as it was resting on the beach, could see it? It was there exposed? [98—28]

A. You could look from the inside.

Q. So that if His Honor wanted to go down there and look at the keel, His Honor could see it?

A. You could see from the top side if it was cracked or not; didn't have to dig under it to see it.

Q. Did you think the boat was, as a matter of fact, hardly worth the cost of repairs?

A. I hesitated myself.

Q. Huh?

A. If it had been my own, I would have hesitated.

Q. Let's develop that a little further. What do you think she was worth, as an old 16-year old boat, 17 year old boat, built in 1906, what would you think she was worth, according to what you could go out and buy boats for in the market? You could pick her up for a thousand dollars anyway, couldn't you?

A. No, I didn't think you could have bought it for a thousand dollars. You can't buy much of a boat for a thousand dollars even today.

(Testimony of A. J. Inman.)

Q. You don't know what the "Lubra" brought, do you, or any of these other boats that I spoke about? Let's see if you do. Do you know the "Lubra"?

A. No, I don't know as I do, not by name. I may have seen her.

Q. You wouldn't know about that boat, then?

A. No.

Q. You know the "Helen A"?

A. Yes.

Q. She was sold last year?

A. Yes.

Q. What did she bring?

[99—29]

A. I couldn't tell you.

Q. Huh?

A. I couldn't tell you.

Q. Now, she's eight tons net. How about the "Dixie"?

A. The "Dixie"?

Q. Yes.

A. Yes.

Q. You know the "Dixie"?

A. Yes.

Q. She was nine tons?

A. Yes.

Q. She was sold last year?

A. I expect so.

Q. You know she brought \$500 right here in the market?

A. And that's about six bits more than she was worth?

Q. Huh?

A. That's about six bits more than she was worth.

Q. Yes, but she was built in 1906?

A. Yes.

Q. She was nine tons. And the "Wildwood" was built in 1906, and she was 13 tons?

A. Yes.

Q. And it was built, by your own confession, by

(Testimony of A. J. Inman.)

men who were not boat builders.

A. Yes. [100—30]

Q. Now, Mr. Inman, in your judgment, it would be a doubtful question whether you would want to spend money to repair her?

A. Yes. Now, that isn't because she's rotten or anything of that kind, because the boat was absolutely not rotten.

Q. But her value?

A. That's the way I figured.

Q. If you have to go out and spend thirteen, take thirteen hundred out of the bank and put it into that boat, it is a question whether you wouldn't take your thirteen or fourteen hundred dollars and buy a new boat rather than repair the old one?

A. That's the way I looked at it.

Q. And you know that thirteen or fourteen hundred dollars spent in doing the work you would do on that boat wouldn't give you a very good job, would it?

A. You never can make a new boat out of an old one. See?

Q. No; an old boat that was built in 1906, built the way that boat was, it would be just a waste of money to put thirteen or fourteen hundred dollars into her?

A. She was built too heavy; too strong in spots. That's the way they do. They don't build uniform. That's the trouble with men that's not used to that.
[101—31]

(Testimony of A. J. Inman.)

Q. This boat was built, as you say, built by men who were not used to it; so she was built heavy, strong in spots. A. They do that always.

Q. She wasn't a well built boat?

A. I couldn't say that she was.

Q. Now, coming to this, if the boat had been well built, a good, strong boat, well built, now, as a practical boat builder like yourself, you know she wouldn't have suffered the damage she did?

A. No, if that boat was my own, made by me, it would have cut her stern off and wouldn't hurt her at all.

Mr. COSGROVE.—It would cut the stern right off?

WITNESS.—Yes; that's just the way I figured it.

Q. That is, cut her stern off. A. Yes.

Q. Of course, it didn't cut her stern off?

A. No.

Q. You don't mean to convey the impression to His Honor that your boat would be less strong than that one? A. It would have been; yes.

Q. Your boat would have been weaker.

A. It wouldn't hurt the forward part. That's what I'm driving at.

Q. It wouldn't have drawn her out of line?

A. It wouldn't have drawn her out of line; just simply cut her [102—32] off and went on.

Q. In other words, this boat was sprung and

(Testimony of A. J. Inman.)

jammed out of shape because she was an old, weak boat?

A. She was too heavily built; too heavy a frame.

Q. When a boat with too heavy a frame gets a blow like that, why the damage is greater than it would be with a well-built boat?

A. Her frame was heavy enough for a boat twice that size.

Q. Yes. And she suffered greater damage, therefore, because of her particular kind of construction, whether you call it weak or strong. Would you say that lying on the beach down there, that she would hog?

A. No; it wouldn't hog her.

Q. And warp out of shape? A. No.

Q. You wouldn't think that it would make any difference?

A. That was done that way when it was struck, when she hit—twisted.

Q. She wouldn't be twisted that way now and her frame sprung if she had been strong or the right kind of build.

A. With that kind of jar, she would have sprung away. Couldn't help it.

Q. But she wouldn't have suffered nearly the damage that she would have otherwise.

A. The year before last I had to repair one the same way. It was knocked over, I think, 18 inches, twisted in the same way and, mind you, that only cut two planks. That was a cannery tender, but the stem was 18 inches out of line.

(Testimony of A. J. Inman.)

Q. And that was due to faulty construction to begin with?

A. No; that was due from the blow it got and it was guarded.

Q. But you say, in this particular case, coming down to the [103—33] “Wildwood” you do say that because of the blow she got that she sprung out of shape and she is in a worse condition than she would have been if she had been well built.

A. She struck on the weakest part of the boat; her weakest place. If that had been a foot forward where she struck, it wouldn’t have hurt it much.

Q. But because of this faulty construction, she suffered more than she would have otherwise?

A. All those boats have, as a rule, a weak stern. See? Any overhanging boat.

Mr. MARTIN.—That’s all.

Redirect Examination by Mr. COSGROVE.

Q. Do I understand you to say this boat is not well built?

A. She is very well built in this way: She is built extra heavy, different from most boats. She is awfully strong in places, but you take any boat, in the back end, as a rule, is the weakest place in them.

Q. Would you say then, that that boat possesses faulty construction?

A. Oh, no, no; not necessarily that.

Q. I mean the “Wildwood.” You say she is faultily constructed?

(Testimony of A. J. Inman.)

A. She was built this way: she was built by men that were not boat builders. They build them strong in their idea in places and weak in other places. Now, if that boat had been hit a foot forward, it wouldn't hurt her half as bad.

Q. But because she was so strongly built, instead of going all the way through it, instead of the way the "Eagle" would do, it simply jarred her?

A. Yes; shook her, drew her in.

Q. So that, instead of being faultily constructed, it was built [104—34] too strongly?

A. In striking the side that way and being so solid, it pulled her right back from the stem—slipped her, whereas, if the boat had been one of mine, it wouldn't have done that, because it would have been much weaker. It would have cut through her and wouldn't hurt the forward part at all.

Q. By the way, these figures that you say you have prepared, are they at your home, at your place of business?

A. I think they are, if I haven't destroyed them.

Q. Will you kindly look them up and have them at two o'clock? A. Yes

Mr. COSGROVE.—That's all.

Recross-examination by Mr. MARTIN.

Q. Let me call your attention to this diagram here, Claimant's Exhibit 2 for identification. Would that fairly represent the timbers and frame of a boat in a general way, for purpose of illustration, if you are looking right through the frame?

(Testimony of A. J. Inman.)

A. Looking standing up on top? Looking down?

Q. No, standing, looking inside?

A. Yes, but you don't want this one here (indicating). That goes inside of your rib.

Q. Now, calling your attention to letters A, B, and C, those are called cant timbers, aren't they? as a practical boat builder, they are called cant timbers?

A. Well, I never had any real particular name for them.

Q. Those are the timbers that come up in the stern. A. I see.

Q. Now, where was this boat struck, Mr Inman? She was struck aft, four or five feet from the stern, wasn't she?

A. No; you see, she was struck in here (pointing) some place. [105—35]

Q. Struck right about there (indicating). Place where the boat was struck, past the stern post; back of the stern post.

The COURT.—Back of the stern post?

Mr. MARTIN.—No; forward of the stern post?

The COURT.—Forward of the stern post.

Q. How much, in what portion would you say she was struck from the bow down to the stern? Where did that blow strike her?

A. That would be about—

Q. (Interrupting.) Aft of amidships?

A. Yes; it's aft of amidships?

Q. And about halfway between amidships and the stern?

(Testimony of A. J. Inman.)

A. Yes; about halfway between amidships and the stern.

Q. Then it would be just a little bit forward of the stern post?

A. A little forward of the stern post.

Q. Would that (indicating) be about it?

A. I would think so.

Q. Let that represent the letter X.

A. Just roughly.

Q. That X, then, would represent about where she was stuck?

A. I think that would be about right.

Q. Now you say she had steamed, not steamed but natural crooks?

A. Those were natural crooks.

Q. The crooks were in the frame forward of this place where she was struck? A. Yes.

Q. And from the place where she was struck aft, they were sawed timbers, weren't they?

A. I would not say they were.

Q. You wouldn't say?

A. No, because I don't know.

Q. But if she had sawed timbers from that frame, where she was [106—36] struck aft, why that wouldn't be good construction.

A. If I had been repairing it, I would have put in sawed frames—

Q. How is that?

A. The sawed frames are just as strong as the natural crooks, if they are put in right.

(Testimony of A. J. Inman.)

Q. How about these frames?

A. They should be just as strong as the natural crooks.

Q. Do you know whether those frames were well put in or not as a matter of ship construction?

A. The only thing that was out of place was that cant piece inside there. That should have been a little heavier. That's the matter with that.

Q. And that being so, and those cant timbers being of that weak construction, it sprung open a whole lot more than she would have otherwise, didn't it, in your judgment, as a boat builder?

A. No, that wouldn't have stopped that part. That wouldn't have stopped that part at all. That timber in there had nothing to do with the top part.

Q. But you do say that her general faulty construction was such that the damage was much worse and greater than it would otherwise have been?

A. Size them up any way you want to, there is practically nothing you can put in there to stop that anyway. You take two boats coming together at any twelve miles an hour, whatever it might be, it's quite a blow.

Q. Where was she struck? How did the colliding vessel strike her [107—37]

A. It looked as though, to me, as though she struck the blow going toward the stern on her.

Q. Well, the timbers indicate that, don't they?

A. Well, yes; everything shows that.

Q. The way the wood is dented in?

(Testimony of A. J. Inman.)

A. It shows that; yes.

Q. So there is no question, in this particular case, there is no question or no chance that she was coming the other way and struck her blow going forward, but she struck her ranging aft?

A. Yes. [108—38]

Testimony of George Thompson, for the Libelant.

GEORGE THOMPSON, called as a witness on behalf of the libellant, having been first duly sworn, testified as follows:

Direct Examination by Mr. COSGROVE.

Q. What is your name? A. George Thompson.

Q. Where do you live?

A. Charcoal Point, at the Marine Ways.

Q. Are you in business there?

A. Yes, repairing boats for the Northern Machine works.

Q. Is that your trade—shipbuilder?

A. That is my business.

Q. How long have you been engaged in the trade?

A. Where? In this city, altogether?

Q. Anywhere, altogether.

A. About thirty-four years.

Q. How long have you been in that business here?

A. Three years; three years this month.

Q. Have you had occasion to examine the gas power boat "Wildwood"?

A. I have had two occasions.

Q. One was at the request of Mr. Brindle, the owner?

(Testimony of George Thompson.)

A. Yes, I was down there with Mr. Schlothman last summer. I can't recall the date of the first examination, but the second—

Q. (Interrupting.) Did you examine that boat at the instance of anybody else? A. Yes.

Q. From whom did the other request come?

A. Come from Mr. Martin and Mr. Selig.

Q. Did you make a survey of her to determine how badly damaged she was?

A. I made the best survey I knew how. [109—39]

Q. For what purpose was that made?

Q. Made to estimate what the cost would be to put her in shape to go to sea.

Q. Have you those figures with you?

A. Beg pardon?

Q. Have you those figures with you?

A. Yes, I have.

Q. What is your total bid, Mr. Thompson?

A. My total bid was \$1,052.50, providing I don't have to put a new keel in her, but if she should have to have a new keel, it would be \$250 more to go on to that. The way she was laying, I couldn't see whether the keel would have to come out or not.

Cross-examination by Mr. MARTIN.

Q. You told me that, in your judgment, that apparently there wouldn't have to be a new keel?

A. So far as I can see; yes. Q. Yes.

A. I didn't make any statement that it wouldn't have to come out, but so far as I could see, all that I could see of it I couldn't tell.

(Testimony of George Thompson.)

Q. The boat is canted over on her side over on the beach? A. Yes.

Q. And you can see under the keel? I believe you went down with your rubber boots, kneeled down and looked under?

A. I took a sighting fore and aft, but her shoe was still on and you couldn't very well see her keel.

Q. But, now, if there had been any seams in the keel, it would have been open to you on inspection?

A. If it had been on the port side, I certainly would have seen it. [110—40]

Q. And you looked down. The keel was canted over, just like the edge of this book, and you could see whether there was any seams breaking?

A. The shoe was still on. The keel might have it, but still not show a split.

Q. In your judgment, do you think you would have to put in a new keel?

A. I was not sure of the damage. I made an estimate of it in case it did have to go in. I wouldn't want to swear that she isn't damaged, because I couldn't see the damage laying down that way. Before I could say, I would want to tear into her.

The COURT.—Just a moment. Let me ask right here, if the keel is cracked, would you have to take the keel out?

A. Yes, if the keel was split through, it would have to come out. There is no possible way of making it tight that I know of otherwise.

Q. But Mr. Thompson, if there is a crack, when

(Testimony of George Thompson.)

you got down on your knees and looked up from that edge of that keel exposed to you, you would have seen it, wouldn't you?

A. Well, I couldn't see the bottom edge of the keel.

Q. But the covering or the shoe would have been cracked if the keel was cracked?

A. Not necessarily. The stern post is mortised down into the shoe—into the keel, not into the shoe, but is mortised down into the keel, and if that stern post had been driven to the starboard, she would either have broken the *t* off or split the keel.

Q. But on the investigation you made, looking at the stern post, where it is mortised down to the keel, you told me you [111—41] didn't think she would need a new keel?

A. I didn't say I didn't think so. I said I didn't know.

Q. Don't you remember that?

A. I remember your suggestion. You said, "Does it look all right?" and I said, "So far as I can see now, it looks all right," but I wouldn't swear that it was all right, because all I could see was, as I stated. We couldn't look into the dead-wood. You remember, I told you about that. We even talked about getting permission to tear it off.

Q. The figure that you have given us, of course, allows for, well, a measure of profits for your concern, doesn't?

(Testimony of George Thompson.)

A. Well, it is a figure—it's not exactly a figure either; it's an estimate.

Q. But it allows for a profit to your concern, doesn't it?

A. Why it allows in this way: that I have got to pull that boat out and repair her and still I'd hate like everything to go over my estimate.

Q. But what do you figure—we don't want, of course, to know the details of your business, but what do you allow for the price of labor?

A. What do we allow for the price of labor?

Q. Yes, what do you figure, Mr. Thompson? That is to say, you figure for the cost of your marine ways and the use of your ways and the use of so many men on the job at so much a day?

A. Yes.

Q. How long did you figure the job would take—ten days?

A. The job will take longer than that for me. You asked me that question and I told you I couldn't give you any definite figure on that for this reason: that it might be the only job and maybe, in that time, there are several other jobs there that I have got to take men off and send them on [112—42] other jobs and with men limited—I have only four men at the present time.

Q. And that means, of course, Mr. Thompson, that if other men, whose work is important—clients of yours—want their business done, you have got to try to accommodate them all?

A. I have to, yes.

(Testimony of George Thompson.)

Q. If a rush order comes in, you have got to pull men off this job and send one here and one there? A. Yes.

Q. But assuming that you could work uninterruptedly, assuming that you could go right ahead and stay with the job till completed, how long would it take you?

A. I think about fourteen or fifteen days.

Q. And you reasonably use how many men on that work? A. About six men.

Q. About six men? A. Yes.

Q. And you mean to say that it would take six men fourteen or fifteen days to do the work?

A. I think it really would.

Q. Now, to put her back just as she was before the collision, is that what you mean?

A. Well, that is just taking the boat as she lays on the beach there and putting her in seaworthy condition. That takes in everything that should be done for that boat to go to the sea—paint and everything.

Q. But you think it would take fourteen or fifteen days? A. Yes.

Q. With your crew of men? A. Yes, sir.
[113—44]

Q. And you would do it for \$1,050?

A. Yes; that's my estimate.

Direct Examination by Mr. COSGROVE.

Q. Now, just a question. Would you say she was a well built boat?

(Testimony of George Thompson.)

A. She might be a little overly heavy in places, but to get right down and say how she is fastened, a man would naturally have to tear into her.

Q. But I mean, from the examination that you did make, would you say she was well built or poorly built.

A. That's something that it's pretty hard for me to give an opinion on. I would have to tear into her. You can't judge how she is unless you take out something to see.

Q. Did you find any evidence of decay?

A. Nothing to speak of.

Q. No decay.

A. No; you'd find it a little doughty here and there, but nothing what you would call decay.

Q. And your judgment would be that she was in good condition prior to the collision?

A. Yes, so far as I know.

Mr. COSGROVE.—That's all.

Recross-examination by Mr. MARTIN. [114—45]

Q. Don't you know, sir, that when you looked at it you commented on the fact that she had common wire nails driven into her instead of boat nails? Don't you know that? Didn't you make that observation to me? A. Yes.

Q. You know also that on the cant timbers, aft, where this collision occurred, where she was struck, was sawed stuff, don't you? A. Yes.

Q. And very poorly put in?

A. Well, I couldn't say. You can't see the fas-

(Testimony of George Thompson.)

tening of the frame. Her frame is fastened down to the deadwood in the stern.

Q. Is there any deadwood in her?

A. Yes, there is deadwood from her sleeve log down. You see your sleeve log is built up on your deadwood.

Q. The sleeve log is how high off the keel, about a foot? A. I should judge it must be.

Q. A foot off, about.

A. Maybe built perhaps eight inches off, maybe ten. Maybe one piece between the center of the sleeve log and the upper side of the keel. I wouldn't say, because the water was over there when we was in.

Q. You know that she was built in 1906 by men that were not boat builders?

A. I have heard rumors to that effect, but I don't know the men.

Q. Well, don't you know from the construction of the vessel that she is not a well-built vessel?

A. I wouldn't say she is not well built. The only way I could state would be if I got into her and saw how the fastenings [115—46] were put in, then I might tell whether she was well put together or not. Now, you mentioned that vessel being fastened together with wire nails. Well, I, for one claim that wire nails will hold better than boat nails, providing the boat nail is not clinched. A boat nail is no good in a vessel unless it is clinched. A boat nail is tapered like a wedge and

(Testimony of George Thompson.)

as soon as the nail starts, you can pull them out with your hand.

Q. But you didn't have occasion to examine these nails to see whether they were clinched or not?

A. No, wire nails wouldn't be clinched. If they were going to clinch them, they would be boat nails. It would most likely be a sawed frame.

Q. Mr. Thompson, would you say from the blow that that vessel got that she was, because of her age and original faulty construction, more susceptible to injury?

A. Well, she might be some from the way she was built and the amount of fish she was carrying. She's a boat heavily built and the chances are she felt the shock far more than she would have if she had been a lighter boat.

Q. What is your judgment, looking now to the collision itself and the visual evidences of the collision, from the blow that she received, whether her faulty construction and her age contributed to her injury.

A. Well, she's a pretty sound boat.

Q. In other words, Mr. Thompson, this: if she had been a well built, strong boat, she wouldn't have received near the injury from that blow that she would otherwise?

A. Well, I think she would; I really think she would. [116—47]

Q. You really think she would? A. Yes.

Q. The way those two vessels came together the

(Testimony of George Thompson.)

injury would be just the same on a new vessel as on an old vessel?

A. I can't see anything else.

Q. But her timbers are sprung and the planking of the starboard side is six or eight inches off, out of plumb.

A. She looks as though her stern is knocked over to the starboard about six inches, as near as I can see.

Q. But you know that the stern wouldn't be knocked over to starboard on a new vessel?

A. It most likely would on any old vessel.

Mr. MARTIN.—Just one question. Would she, in your judgment, be worth repairing?

A. I don't hardly think so. I think she's pretty badly shook up.

Q. You mean by that, not being worth repairing, that you could go out and buy a vessel probably just as good as she was at her age, and as to style, type and build, of 13 tons fish carrying capacity probably for somewheres around \$1,000?

A. That is, bare of the engine?

Q. Beg pardon?

A. That is, bare of the engine; that would be for the hull?

Q. Yes. A. Uh-huh. [117—48]

Q. The value of the hull. And that being so—

The COURT.—Did you answer that question?

The WITNESS.—No, I haven't answered it. It would be something pretty hard to say if a man could pick up another boat or not.

(Testimony of George Thompson.)

Q. Well, in the open market, I suppose, as you know, boats have been offered for sale here in Ketchikan, and you know the cost of that work to put her back to where she was before the collision. Knowing this, would you, if you were the owner of such a boat, if you were a prudent, careful man, would you repair the boat or buy a new one?

The COURT.—That's hardly a fair question. The question is, would you repair this hull or buy a new hull to take its place?

The WITNESS.—Well, I don't think I would repair the hull.

Q. Could you build a new hull and replace it for the same price that you could repair this one for?

A. No.

Q. You could not?

A. I don't think so. You can't here, but if you'd go to Seattle, they build boats cheaper there than we do here.

Q. Just let me ask you this question: Could you replace that vessel, not with a new vessel, but could you replace her, a vessel built in 1906, for the amount of money that you would have to spend in repairing it?

A. That is, buy a second-hand vessel?

Q. Yes. A. Well, I dare say you could.

Q. You think you could? A. Yes. [118—49]

Q. In other words, if you had a thousand dollars and wanted to spend it, and figured out the cost of repairs to the boat, you would hesitate before you would put that money into it?

(Testimony of George Thompson.)

A. I would.

Q. You would look about to buy a new one?

A. Yes.

Q. Or buy a second-hand boat?

A. Or buy a second-hand boat.

Q. That is barring the machinery and equipment.

A. Barring machinery and equipment. That is just the bare hull, you might say.

Q. Do you think, Mr. Thompson, that for a thousand dollars, knowing the boat here in Ketchikan, that you could probably pick up a hull to better advantage or just as good advantage as the hull you would have.

A. I wouldn't say in regards to picking up something here in Ketchikan.

Q. But you think you could at least down in Seattle? A. I think down—

Q. (Interrupting.) Or down below in Vancouver or Victoria.

A. I think perhaps you could.

Redirect Examination by Mr. COSGROVE.

Q. In figuring the cost of that hull, you would figure in the cost of the search, I presume, in searching for it?

Mr. MARTIN.—I object, if your Honor please. That, it seems to me is not a proper item.

The COURT.—He may answer.

Q. You would figure in the cost of your trip around the country?

A. No, I couldn't figure in that. If it was myself, I couldn't figure on that myself. [119—50]

(Testimony of George Thompson.)

Q. But what would it cost, in your judgment, to replace the hull with one as near the character and quality of that hull? A. Me?

Q. Yes. A. For me to buy a new one?

Q. Yes. Suppose you had to replace that with a hull of similar character and similar quality, what in your judgment, would it cost?

Q. Would it cost more or less than your cost of repairs?

Mr. MARTIN.—I object, if your Honor please, for this reason: that there is an entirely dissimilar condition. Here is a vessel built in 1906, an old vessel, and you must take that into consideration.

It isn't what you could buy a new boat for or build a new boat for. The question is what would be the reasonable market value of that boat.

The COURT.—Certainly.

Mr. MARTIN.—(Continuing.) Considering a vessel of that age; so I think the question is improper.

The COURT.—He may answer—what he could replace the hull for, of the same kind and character, to his knowledge.

Mr. MARTIN.—(Interposing.) But not to buy a new one. Do I understand your Honor's ruling?

The COURT.—Well, he may answer as he pleases as to that question.

A. I know you couldn't build a new one for that.
[120—51]

The COURT.—He has already answered that he couldn't build a new one for that.

(Testimony of George Thompson.)

The WITNESS.—But I dare say, if a man was below that he could get a boat equal to that boat, that is the hull, in Seattle, barring traveling expenses, for a thousand dollars.

Q. You don't know what his traveling expenses might be? A. No; I don't.

(Witness excused.) [121—52]

Testimony of Nora Ethel Kinyon, for the Libellant.

NORA ETHEL KINYON, called as a witness on behalf of the libellant, having been first duly sworn, testified as follows:

Direct Examination by Mr. C. H. COSGROVE.

Q. Please state your name.

A. Nora Ethel Kinyon.

Q. Where do you live?

A. Mary Island light station.

Q. And does your husband live there with you?

A. Yes.

Q. He is the lighthouse-keeper there?

A. He is classed as the assistant keeper.

Q. Now, were you and he living there on the 23d of July, 1921? A. We were.

Q. Do you recollect anything of an unusual occurrence there on the night of the 23d of July last?

A. I do.

Q. Just tell the Court what you saw that night.

A. Well—

Q. (Interrupting.) Stating the time.

A. About ten o'clock in the evening we—I ob-

(Testimony of Nora Ethel Kinyon.)

served, from our kitchen window, a bright light bound south.

Q. What did you then do?

A. I went to the front of the house, on the porch, where I [122—53] could observe it more closely.

Q. Why did you do that?

A. To ascertain whether it was the mail boat that I was expecting, or not.

Q. You were awaiting the mail boat. What is the name of the mail boat?

A. "Carmen."

Q. You were expecting her from Ketchikan?

A. Yes.

Q. And this boat that you saw, or this bright light, which way was that heading?

A. South, or southerly direction, we call it.

Q. How far away was she?

A. Well, approximately a mile.

Q. What was the condition of the weather that night? A. Very fine.

Q. It was clear? A. It was partly so.

Q. Yes. Any moon?

A. There was a moon at times. It was quite light.

Q. Now, you say that in anticipation of the arrival of the mail boat, you went to the porch, thinking that this bright light indicated the presence of the mail boat? A. Yes.

Q. Now, just go on from there and tell the Court what you saw and did after that.

(Testimony of Nora Ethel Kinyon.)

A. As I entered the porch, I observed a very green light, through an alder tree which stands slightly to, I should say to the left, northwest I guess you would call it—of the house. It's on the lawn, some distance from the house. But [123—54] through this tree, I could observe the green light of this boat, and by the arrangement of the light, I knew that it wasn't the "Carmen."

Q. Oh, you knew it was not the "Carmen"?

A. No.

Q. What did you do after that?

A. I heard the exhaust of another engine; so I listened and I concluded that it sounded like the "Taku's" engine.

Q. Coming from what direction?

A. The southerly direction.

Q. Could you see that boat?

A. No; I couldn't see any lights.

Q. Were you alone at that time?

A. My husband was right near, on the porch, at that time that I heard this.

Q. Oh, yes; this thing. A. This exhaust.

Q. What happened after that?

A. We looked for the lights of this boat and couldn't see none, though we could hear her exhaust distinctly.

Q. That is the boat you saw coming from the southerly direction?

A. From the south. We could discern distinctly the lights of the boat which was southbound. On the north-bound boat we could see no light, but hear

(Testimony of Nora Ethel Kinyon.)

her exhaust very distinctly, and my husband got the glasses and— [124—55]

Q. Could you tell the Court, from the sound of the exhaust of this boat coming from the southerly direction, whether she was traveling at full speed or slowly?

A. She was traveling at full speed, that would be my idea.

Q. Now, did you continue with your husband in that observation? A. Yes.

Q. And if so, how long?

A. Well, for many minutes, because I considered the boats were dangerously near; that is, I considered they were headed for each other, or very nearly so, and I expected a collision.

Q. And your husband stood there with you during that time? A. We both stood there.

Q. Did they collide? A. They did.

Q. Tell the Court the circumstances of that collision as you saw them.

A. A few seconds before the collision occurred, the north-bound boat flashed on her lights and when she struck the south-bound boat, I could distinctly see three lights—a red light, a green light and a white light.

Q. On which boat?

A. On the north-bound boat.

Q. On the north-bound boat. And you say she flashed on those [125—56] lights how long before she struck the other boat?

(Testimony of Nora Ethel Kinyon.)

A. A very few seconds. I couldn't say exactly.

Q. So that when she struck the other boat, she must have been headed for the point where you were standing?

A. Just momentarily, before they struck, the helmsman must have directed his course directly toward us. It seemed to me that he made, simply threw his boat to the starboard, or to our direction—not to starboard, it wouldn't be. It would be to port.

Q. The bow turned to port?

A. Yes; bow turned in our direction. Being north-bound, that would naturally be to port.

Q. Now, had you observed the south-bound boat before that? A. Yes; I observed her.

Q. How many of her lights did you see.

A. At the time they struck, I could only see the white light, because the green had been shut out, being south of us, of the station.

Q. But had you seen her lights prior to that time? A. Yes.

Q. All of them?

A. No; just the green and the white.

Q. Just the green and the white. Did you notice what happened after they collided, if anything.

A. We could hear excited talk, but the only words, or sentence, that I could understand was, I heard one man say, "How did this happen anyway?"

Q. When they collided, what would be your judgment as to the distance the boats were away from

(Testimony of Nora Ethel Kinyon.)

where you and your husband were standing? [126—57]

A. Well, I should judge they were from the shore, from the beach, not over 500 feet, but that is not stating it exactly, as I have no means of knowing.

Q. You heard this voice distinctly?

A. I heard the voice distinctly.

Q. Of course, you couldn't tell which boat it came from? A. No; I had no idea.

Q. Have you since learned the names of those boats? A. Yes.

Q. What is the name of the north-bound boat?

A. The "Eagle."

Q. The "Eagle." And what is the name of the south-bound boat? A. The "Wildwood."

Cross-examination by Mr. W. S. MARTIN.

Q. Mrs. Kinyon, this was what time in the evening?

A. About ten o'clock, as near as I could state.

Q. You and your husband were in your home waiting for this boat to pick you up?

A. No; the boat bring us mail.

Q. Oh, the boat brings you mail?

A. Yes; twice a month.

Q. Your house is how far from the beach?

A. Well, I couldn't tell you exactly.

Q. Was it dark?

A. No; it was a fine night. The moon had fullled on the 19th of the month, I think.

(Testimony of Nora Ethel Kinyon.)

Q. Where was the moon at that time?

A. At the time they struck, they were directly under the sheen of the moon. [127—58]

Q. The moon would be off in the distance, off to the eastward?

A. Yes; it was about, the moon was about north-east by north, at least a half east, the way we were looking from the position we were in at the house.

Mr. MARTIN.—I have a chart I would like to place before the witness, and I would like to offer this as Claimant's Three.

The COURT.—You may offer it for identification and then offer it in your case.

Mr. MARTIN.—(Pointing to chart which has been pinned to wall.) Referring now to Claimant's Exhibit Three, you see where I direct you to Mary Island on the chart. A. Yes.

Q. Well, you tell us just where your lighthouse and your house are on that island.

A. I'll try to.

Q. Point it out.

The COURT.—As near as you can.

WITNESS.—(Examining chart.) I don't know whether everything is given here.

Q. Well, mark it as near as you can.

A. Well, it's marked right here (indicating).

Q. Well, "right here." Just mark the point.

A. "Fog-horn," I think that would be it.

Q. Just mark the point with a pencil. Mark that and let that be known as "Point A."

(Witness does so.)

(Testimony of Nora Ethel Kinyon.)

Q. That is where you have made the point. [128—59] Just say what it says there.

A. "Reed horn," it says there, and there is a star, marking the exact location of the tower.

Q. Now, Mrs. Kinyon, where, when you looked out of your window or from the porch, where did you see this light that you first observed?

A. Well, I can't tell exactly, but it was—I seen it at least half way between Point Winslow and the light right in there.

Q. Just point that out please.

A. It would be something like that (indicating). This is approximately.

Q. Yes.

A. (Examining chart.) Well, we'll say halfway between.

Q. Just mark the letter B there.

A. That is probably farther out from the shore.

Q. Well, it wasn't the right letter, the letter there where you marked that last point.

A. What shall I make it?

A. Just mark it with the letter B.

A. The letter B; yes. (Witness does so.)

Q. How did you happen to observe the light? What was the occasion for it?

A. Well, on this occasion, we were expecting a mail boat. Both of us were there to watch navigation. We see, I think, most every boat that passes in daylight, and, of course, if we are up, we see them by night the same.

(Testimony of Nora Ethel Kinyon.)

Q. And you looked out and saw what light.

A. I saw a white light.

Q. A white light?

A. The mast headlight, I should judge. [129—
60]

Q. Did you see the green light, too?

A. Not at first.

Q. Not at that time? A. Not as I remember.

Q. You just saw the white light; and then did you continue to observe this white light?

A. I passed from the kitchen. The house is, the kitchen—you pass through the dining-room, through the hall and on to the porch.

Q. When the white light was first observed by you, you had, of course, no particular occasion to remember or pay any attention to it. It was just an ordinary light out there in the bay.

A. Yes; I took close observation on account of trying to figure out whether that was the “Carmen” or not, you see.

Q. How long did you watch that white light?

A. Before proceeding to the porch or afterward?

Q. I say, how long did you watch that white light before this collision?

A. Well, it would be several minutes, but I couldn't say just how many minutes.

Q. Then you say that you were attracted to the other boat that turned on her lights? A. Later.

Q. Later.

(Testimony of Nora Ethel Kinyon.)

A. I heard her some time before she flashed on any lights whatever. [130—61]

Q. I mean how far off the island were they?

A. I should judge about 500 feet.

Q. About 500 feet.

A. And south; that is slightly south of the light.

Q. When they did collide, where would you place the two vessels?

A. Well, let's see, I don't know just how this is meant to be, but it would be just a little below, as I observed it from my position, between two old houses and the tower to the south.

Q. That, then, would range, when they came together, would range over towards this other shore?

A. Not necessarily; it could range this (showing) way.

Q. Well, I know; but the vessel would be in the range of this other shore, wouldn't she? That is to say, she would be not square across from your house, but south.

Mr. COSGROVE.—What do you mean, "she"?

Q. I meant to say this vessel that you saw.

A. She was rather east, and farther east than southeast.

Q. Well, just give us a pencil line of the direction of this vessel, the direction this vessel was in when you saw them come together.

Mr. COSGROVE.—Which vessel are you talking about?

(Testimony of Nora Ethel Kinyon.)

Mr. MARTIN.—The colliding vessel; the south-bound vessel. You say that you observed this south-bound vessel from the time that it was opposite your house?

A. It was closer in to the shore than the north-bound boat.

A. Now, you give us a line here, will you, the range of those vessels out there in the darkness, will you, when they collided. Just draw that, will you? [131—62]

A. I would say about like that (showing line drawn on chart). Now, for instance, the house is right here.

Q. Well, "right here." Just mark it, will you?

A. Just about like that (showing).

Q. Well, draw it on the chart.

A. I think that is as nearly as I can tell, because I am not a navigator.

Q. The line would be out about, about southeast.

A. Yes, it would be east of southeast, as I picture it. My directions, my markings here may be very incorrect.

Q. Do you think that line that you have drawn would accurately represent just about the range of that vessel from you, the direction she was in; that is, those colliding vessels?

A. Considering that this is the house, the position of the house is a little different, of course. That would, of course, naturally make the line different, but it was slightly south. [132—63] It

(Testimony of Nora Ethel Kinyon.)

was southeast of the tower and slightly east of south.

Q. You observed the lights all the while, did you?

A. Of this?

Q. Of the south-bound vessel. You observed her range-light? A. I saw a white light.

Q. You saw a green light?

A. Not at that time.

Q. When did you first observe a green light?

A. When I stepped on to the porch, I observed her through this tree. She hadn't gotten abreast of the station then. She was almost abeam, but not quite.

Q. Not abeam or abreast of the station?

A. That is, of our house. The station is a little south or abreast of our house.

Q. Would your house range so that the line of your house would be about east, would be about an east-and-west line?

A. No; I think that the house is set about north-west, and I think the face of our—lets's see; Behm Canal is about magnetic north from us, I think, and the front of our house is to the southern of the Behm canal, as we look a little bit that way, to our left, as we look into Behm Canal.

Q. Does that line that you have drawn fairly represent the direction that these vessels were in when they came together?

A. It does, according to my memory, but I am not familiar with the absolute lines of this. As to

(Testimony of Nora Ethel Kinyon.)

just what the exact direction was, or what the exact course was they took, I might make a radical mistake in that.

Q. Mrs. Kinyon, the principal thing I'm concerned in now is the angle and the direction. Do you believe that that line that you have drawn there represents the line of vision [133—64] where these vessels were out there in the darkness when they came together?

A. Well, I expect, if you were to measure this up on the chart—I followed my memory the best I could, but I wouldn't be certain about that.

Q. Do you recall whether you saw—you say you picked up a green light a little bit after you saw the white light? A. Shortly after.

Q. Shortly after; and you, of course, continued to see the green light?

A. For a few minutes.

Q. Until the point of collision? A. No.

Q. You didn't see the green light then, at the point of collision? A. No.

Q. You had lost the green light?

A. Naturally, when you are right abeam of a boat and she is traveling in a southerly direction, so that close in as she was traveling, her green light at some point—I couldn't state at what point—would be shut out from you, owing to the arrangement of the green light.

Q. That would be shut out?

A. Yes, and it might be burning, just the same.

(Testimony of Nora Ethel Kinyon.)

Q. But you recall that you lost sight of the green light? A. Yes.

Q. You would remember that detail?

A. I remember that.

Q. So that you first saw a white light; then you saw a green light; then you remember losing the green light and seeing nothing but the white light?

A. Yes. [134—65]

Q. Then you say that you saw the lights of another boat flash on?

A. When they were dangerously close.

Q. Well, "when they were dangerously close." You, of course, couldn't see the outline of the hull, could you?

A. Yes, I could discern an object barely with my naked eye, a dark object.

Q. You could?

A. At that time, a dark object; yes.

Q. Even before you saw the lights turned on?

A. Yes.

Q. Which way was the dark object heading?

A. Well, you couldn't—if you see a log out there, you couldn't tell whether it was the end or the side of the log.

Q. You just saw a dark object?

A. I could see this dark object moving.

Q. Then you watched them come together?

A. Yes.

Q. And then saw the lights turned on?

A. I saw—no, the lights were snapped on before we heard the blow.

(Testimony of Nora Ethel Kinyon.)

Q. How far would you say the vessels were apart when the light was snapped on?

A. Well, it is very hard for me to judge, but I would say sixty or a hundred feet, possibly.

Q. You distinctly remember seeing the red and green light of the north-bound vessel?

A. And also the white light.

Q. A white light, too?

A. We saw all of them at the time of the blow. She immediately turned toward us and I heard distinctly the sound of the [135—66] crash.

Q. At the time of the crash, you only saw this one light, that is on the south-bound boat?

A. A white light.

Q. Was that very distinct or rather dim?

A. It was what I should consider a very good light, and I see many of them pass.

Q. How far was that away?

A. I should judge about 500 feet, offshore, or thereabouts. It may have been more or less. More, I should judge, than less.

Q. How far is your house from the beach?

A. Well, I should say, at the tide—the tide was not low then—at the lowest stage of the tide it would be two hundred feet, I should think; that is, if you mean at the farthest point where the light sets. If it were from our house to the landing, it was a very short distance, but the landing is slightly north, northwest of the tower. That is as my directions seem to me. They may not be accurate, but that is what I term them.

(Testimony of Nora Ethel Kinyon.)

Q. And you would estimate the light was what distance from you? A. The light — ?

Q. That is, the lights on the colliding vessel?

A. Oh.

Q. At the time of the collision?

A. Well, I should think about 700 feet.

Mr. MARTIN.—I think that's all.

Redirect Examination by Mr. C. H. COSGROVE.

Q. I would like to have you give the Court your best judgment of the interval *if* time which elapsed between the flashing [136—67] on of the lights on the north-bound boat and the collision?

A. Well, I should say, probably five seconds; not more, I don't believe.

Q. Hardly—

A. (Interrupting.) It was such a short time there was no time for thinking.

Q. I presume your recollection of what you saw that night is very clear; is it not?

A. Certainly.

Q. Have you any way of keeping those matters clearly in your mind?

A. I keep a daily diary of events.

Q. Have you got your diary with you?

A. I have.

Q. Did you make any entry at that time or shortly afterward regarding what happened?

A. Yes.

Q. Would you mind opening to it?

Mr. MARTIN.—If your honor please, I object to that as entirely subservient.

(Testimony of Nora Ethel Kinyon.)

The COURT.—It is not necessary. She testified to all the facts from her memory.

Mr. COSGROVE.—Very well; I withdraw that question, and will ask you whether there is an account in your daily course of keeping a diary. Did you write an account of it in your daily diary of what happened? A. I did as I have seen it.

Mr. COSGROVE.—That's all.

Recross-examination by Mr. W. S. MARTIN.

Q. Do you fix the time at ten o'clock? [137—68]

A. Well, I think it was about ten o'clock. You know, with us, getting our time, we get it from the mail boat and from the ships, etc., at different time. We are sometimes several minutes fast or slow.

Q. And your best recollection would be about ten o'clock?

A. Yes; about; I think it was probably slightly before ten, although I didn't look at the clock. It could have been.

Q. Where was the moon, as you recall, in the sky—up overhead or down on the horizon?

A. No; it was just as I stood on the porch, and the position of the boats were in this direction (indicating) from me, the boats were within the moon sheen.

Q. How high was the moon on an angle from your vision?

The COURT.—About the horizon?

Q. Above the horizon. Considering now that the zenith is overhead and 90 degrees; halfway would be 45 degrees—where was the moon?

(Testimony of Nora Ethel Kinyon.)

A. It was probably—

Q. (Interrupting.) In other words, was it more than halfway up or was it overhead?

A. I don't think it was hardly halfway up. There is a mountain that the moon comes over that's almost in line with this position; but now I couldn't tell you just how high the moon was; but I don't think it was very high at that time. What I mean, the bright part of the moon or sheen, it cast a bright sheen across the water, and I said to my husband, "They'll see each other when they get into the moon sheen."

Q. Now, just a moment; the north-bound vessel would go into the dark area, wouldn't it?

A. No; they would be right in the part of the moon—[138—69]

Q. (Interrupting.) I know, but the vessel coming north would be heading into Point Alba, that is, the high mountainous land there (pointing).

A. No; Point Alba appears high and close from a distance, but next to the water, it is not a high point of land.

Q. It's high land right off Mary Island?

A. Well, it's back from the shore a ways and the distance is at least four miles, I should think, at the nearest point.

Q. Well, now, that was all dark, wasn't it, there?

A. No, because we could see the moon sheen clear across the channel.

Q. You could see the moon—

(Testimony of Nora Ethel Kinyon.)

A. (Continuing.) It cast a sheen clear across the channel.

Q. You could see the moon over across the top of the mountains in the East, but wasn't it dark?

A. It shone over the water; the moon shone right over the water.

Q. Wasn't it dark as you looked toward that opposite shore to the eastward?

A. Not until you would get at least two-thirds of the distance across. I couldn't tell you. There might have been a shadow.

Q. Wasn't it dark to the north and northeast?

A. No.

Q. In other words, isn't there a dark area because of the high land at Point Alba and the eastern shore? A. No; there is not.

Q. You don't think there is?

A. To my observation, there is not, unless I err.

Q. Of course, with these vessels, you were looking off southeast and they were right in the range of the moonlight.

A. But I observed the fine night all throughout the evening. [139—70] Other boats had passed also.

Redirect Examination by Mr. C. H. COSGROVE.

Q. How long have you and your husband lived there?

A. I have lived there since the 18th of last April; that would be a year this 18th of April.

Q. April of last year? A. Yes.

(Testimony of Nora Ethel Kinyon.)

Q. How long has your husband been there?

A. He came, I think, on the 17th day of February last year.

Q. Have you lived there continuously during that time since? A. I have.

Q. Has your husband been located there continuously? A. He has.

Recross-examination by Mr. W. S. MARTIN.

Q. Do you remember whether up to the moment of the collision, you saw the white light?

A. Yes; I could see the light.

Q. You could see the white light? That is, on the south-bound vessel? A. Yes.

Q. You say that you continuously observed the south-bound vessel from the time that she was right squarely opposite your place, or a little north, down to the time before the other vessel flashed her lights on? That is, you could see this white light right up until—

Q. They came together? A. Yes. [140—71]

Testimony of David Oliver Kinyon, for the Libelant.

DAVID OLIVER KINYON, called as a witness on behalf of the libellant, having been first duly sworn, testified as follows:

Direct Examination by Mr. C. H. COSGROVE.

Q. Please state your name.

A. David Oliver Kinyon.

Q. Where do you live?

(Testimony of David Oliver Kinyon.)

A. I'm stationed at the Mary Island light station.

Q. You are the assistant lighthouse-keeper?

A. I am acting as assistant.

Q. How long have you lived there?

A. Since February, 1921.

Q. Does your wife live there with you?

A. She does.

Q. Were you living there on the 23d day of July, 1921? A. Yes.

Q. Was your wife living with you there at that time? A. She was.

Q. You remember the night of July 23, 1921.

A. I do.

Q. Will you state to the Court if anything of an unusual character happened that night, and, if so, what and at what time?

A. There was a collision between two gas boats, at about ten o'clock. I couldn't give the exact time, but it was in the neighborhood of ten o'clock.

Q. Now, just tell the Court how your attention was drawn to the boat, starting just ahead of the collision.

A. Our attention was drawn to the boat approaching from the north by the headlight, or mast headlight, I am not positive which, but it was a light anyway, and the reason we went outside was because we were expecting a mail boat from [142—73] Ketchikan, and my wife called my attention to the light. I was sitting with my back to the light, reading. She said, "There goes a boat. I wonder if it's the mail boat." I said I

(Testimony of David Oliver Kinyon.)

didn't know. She went outside and I stopped to get the binoculars, and when we got out we concluded that it wasn't the mail boat, but for some time we kept watching the boat until she passed out of sight of us on account of the tower. The tower shut off our view until she came on the other side of the tower on the down-channel side.

Q. Did you see any other light on her besides the mast headlight?

A. I wouldn't swear that I did; not myself. I paid no particular attention.

Q. About that time did you pick up any other boat? A. I did.

Q. From which direction was she coming?

A. She was coming up the channel from Tree Point, as near as I could tell.

Q. Did you see any lights on her?

A. I did not.

Q. Did you hear any noise?

A. I heard the exhaust of the engines; yes.

Q. From the exhaust of her engines, would you say she was traveling at full speed or some lesser speed?

A. Well, as near as I could tell, she was traveling at full speed.

Q. Did you put your glasses on her? A. I did.

Q. Pick her up? A. I picked her up; yes.
[143—74]

Q. How long did you observe her?

A. I observed her for probably as much as five

(Testimony of David Oliver Kinyon.)

minutes, at least—well, I should say, not more than four minutes.

Q. Did you observe her from the time you first picked her up until she struck the other boat?

A. Not continually; no.

Q. Did you see her flash any light?

A. I did.

Q. How long an interval occurred, in your judgment, between the flashing on of her lights and the collision? A. Not more than two seconds.

Q. Two seconds. A. Yes.

Q. In other words, there was the flash of the light and then the impact? A. Yes, sir.

Q. How many lights did she flash on?

A. Three, as near as I could tell.

Q. Could you see those three lights at the time she struck?

A. I could at the time she struck.

Q. How far away were these boats from where you were standing, at the time of the collision?

A. Between five and eight hundred feet.

Q. Did you hear any conversation aboard the boats?

A. I heard voices, but I couldn't distinguish but one voice.

Q. What was that that you heard?

A. Some voice exclaimed, "How did this happen, anyway?"

Q. Have you since found out the names of those boats? A. Yes.

Q. What are the names of them? [144—75]

(Testimony of David Oliver Kinyon.)

A. The "Eagle" and the "Wildwood."

Q. Which one was the "Eagle"?

A. The one that was northbound.

Q. And the "Wildwood" was southbound?

A. Yes, sir.

Q. Did you hear, at any time while you were watching the two boats, especially this northbound one that you speak of, that you picked up with your glasses, did you hear her reverse her engines?

A. I wouldn't be positive that I did; no, sir.

Q. How far away do you think she was before you picked her up with your glasses?

A. It was possibly a mile away.

Q. What were the weather conditions that night?

A. Clear; that is, they must have been. It was clear, partly cloudy.

Q. And the water smooth? A. Yes.

Q. And a moon? A. There was at times.

Q. Was the moon shining at the time of the collision? A. Yes; at that particular spot it was.

Q. Could you tell whether the moon was shining prior to the collision?

A. Part of the time. Part of the time it was obscured by clouds.

Q. How long would you say the moon had been shining, casting a sheen over the water prior to the time that these boats collided?

A. Not over five minutes. [145—76]

(Testimony of David Oliver Kinyon.)

Cross-examination by Mr. W. S. MARTIN.

Q. Where was the moon in the sky; that is, overhead or on the horizon?

A. It was about two hours above the mountain-tops, as near as I could judge.

Q. About two hours above the mountaintops?

A. Yes, sir.

Q. That would be halfway up, wouldn't it?

A. No, sir.

Q. Well, the moon would travel—do you know how fast the moon goes up—how it makes its progress across the sky? A. Well, yes.

Q. You do? A. Approximately; yes.

Q. How many degrees in one hour?

A. That I couldn't say.

Q. Fifteen? A. That I couldn't say.

Q. And if it was two hours up over the mountain-tops, and the mountaintops are quite high—those mountains are twenty-seven, twenty-eight hundred feet high?

A. They might be, but they are a considerable ways off.

Q. As a matter of fact, if the moon was two hours up, she ought to be about halfway up?

A. No, sir.

Q. Do you recall clearly where the moon was—whether it was down on the horizon or halfway up? A. It was neither one.

Q. How? [146—77]

A. It was neither on the horizon nor halfway up.

Q. Well, then, possibly halfway up between that?

(Testimony of David Oliver Kinyon.)

A. Possibly halfway between down on the horizon, from the mountains, I should say, down.

Q. Let me ask you this: What is the general range of Mary Island; that is, in front of your house, the shore line? About northwest, or north-northwest and south-southeast?

A. You mean the general lay of the land?

A. Yes; the general lay of the land on the shore line? A. That is—

The COURT.—(Interposing.) That is, the line of the shore.

A. That is, the direction of the shore line?

Q. Yes; the direction of the shore line.

A. Well, I would say, yes; approximately it is.

Q. Approximately, roughly speaking, north-northwest and south-southeast? A. Yes, sir.

Q. And I suppose your house faces out onto the channel and would be at right angles to that?

A. Yes, approximately so.

Q. So that you would be facing the channel, the general range of the shore?

A. Yes; that is the general range of the shore; yes.

Q. Now, where did you say the two ships came together, with reference to the position you were standing in; that is, as to whether the two vessels came together south, way down along the shore line, or right opposite your house or halfway between?

A. They came together nearly opposite our house. [147—78]

(Testimony of David Oliver Kinyon.)

Q. Nearly opposite your house? A. Yes, sir.

Q. Your house would face, would range along parallel with the shore line?

A. No; they do not. There is a point there and the shore line has a bend in it.

Q. You are, then, familiar with the compass points, aren't you?

A. No; I wouldn't attempt any compass work.

Q. How would you say the colliding vessels, at the moment of the collision or impact, how would you say they would have been from your house?

A. You mean the general direction they were from my house?

Q. No; I mean to say now how they would have been, according to the compass point or figures on the chart. There is Mary Island (pointing to chart). A. Yes, sir.

Q. Can you tell us whether the colliding vessels were off here, or off here (indicating), or off here (indicating) to the westward?

The COURT.—Where were they?

Q. Where they were, in other words.

A. Approximately there (pointing to point on chart). Just a moment, now. They were right in here (indicating).

Q. Mark it, will you?

A. As near as I can; yes, sir.

Q. Mark it with the letter C, if you will.

A. Now, let's see; this is the light right here (indicating).

Q. First, let me ask you where did you first ob-

(Testimony of David Oliver Kinyon.)

serve them before you come to point that on there? Where did you first observe the south-bound vessel? [148—79]

A. She was about this place here (indicating). No; wait a minute; I'm too low down. Right about here (indicating on chart).

Q. Now, you make a C at the point that you first observed the south-bound vessel. Mark it with the letter C.

A. Now, you must remember that this is approximately.

Q. Oh, yes; that's all we can expect, of course.

The COURT.—That is the south-bound vessel?

A. The south-bound vessel; yes. Oh, pardon me; that isn't the south-bound vessel. Right about in there (indicating) was the south-bound vessel when we first picked her up.

Q. Where did the collision occur?

Mr. COSGROVE.—Well, now, you ought to be able to fix that with a letter or something.

Mr. MARTIN.—Referring to the letter B, already on the chart.

Q. Will you fix now the point that they came together as near as you can?

A. Yes, sir; as near as I can. Just a little, right about in this position right here (indicating).

Q. Where did you first make the letter C? Oh, here. Why did you put it down where you have?

A. I made that letter there, because I misunderstood your question. I got it confused with the north-bound boat.

(Testimony of David Oliver Kinyon.)

Q. You thought that I was referring to the south-bound boat?

A. No, sir; you were referring to the north-bound boat.

Q. Yes.

A. Or the south-bound boat, and I thought that you were referring to the north-bound boat.

Q. And you would fix the point of the collision, then, where?

A. Right about there (indicating) as near as I could judge. [149—80]

Q. And that would be on a line, so that His Honor can get it; on a line instead of straight in front of your house, or straight down the shore; about halfway between the point directly in front of you and the shore line?

A. No; it wouldn't.

Q. More nearly abeam?

A. You see, our house set here.

The COURT.—Did they collide south of your house?

WITNESS.—They did; yes. They collided slightly south of the house.

Q. Did you observe the lights on the south-bound vessel from the time you first saw them until the time of the collision? A. Yes, sir.

Q. What lights did you see.

A. I seen—I am not certain. I seen a bright white light. I am not certain whether it was a range-light or mast headlight, or what they call it.

Q. Did you see a colored light at all?

(Testimony of David Oliver Kinyon.)

A. I'm not positive. I wouldn't say that I did; no.

Q. What lights did you observe on the vessel coming north?

A. I didn't observe any until about two seconds before the collision.

Q. Well, now, aren't you mistaken in this, that they threw on the searchlight, snapped it on; haven't you got that fact in mind rather than the fixed lights of the vessel?

A. What do you mean, searchlight?

Q. Well, she has a searchlight, hasn't she?

A. She didn't use it, if she had it.

Q. You observed what lights on the boat going north?

A. I observed three lights—the sidelights and a headlight of some description. [150—81]

Q. She was how far away from you?

A. She was between five and eight hundred feet.

Q. You saw no other light at all, now?

A. No, sir; I did not.

Q. Absolute darkness out there?

A. What is that?

Q. I say, it was absolutely dark and black, except for these three lights, or two lights, or how many— Well, I'll withdraw that. How many did you observe? A. I observed three lights.

Q. You observed three lights.

A. Yes; not at the instant she flashed them on, but two seconds after, I observed them.

Q. Two seconds after? A. Yes.

(Testimony of David Oliver Kinyon.)

Q. What lights did you see when she first came up?

A. The side-light and headlight.

Q. What was the side-light?

The COURT.—What color, do you mean?

Mr. MARTIN.—Sir.

The COURT.—What color?

Mr. MARTIN.—Yes; what was the color of the side-light? A. Red light.

Q. You saw her red light? A. Yes, sir.

Q. First? A. Yes, sir.

Q. Saw a red light and one white light?

A. Yes, at that instant.

Q. Saw no range-light? [151—82]

A. No, sir; I did not; that is, unless one of the three lights was a range-light. I don't know.

Q. Then two seconds later you say you saw the other side-light? A. Yes, sir.

Q. The green light? A. Sir?

Q. You saw the other side-light, the green light?

A. Yes, sir.

Q. So then, she must have, in that two seconds, she must have turned to her left and headed toward the island? A. She did; she headed to shore.

Q. She headed toward the shore?

A. Yes, sir.

Q. She must have made a sharp turn?

A. She turned hard over and she came around quick.

Q. From where you first observed her, she would probably make a turn at an angle of eight points.

(Testimony of David Oliver Kinyon.)

A. I don't know anything about that.

Q. Turn a right angle, or pretty nearly so?

A. Turn sharp around; just about as sharp as she could turn.

Q. You saw the lights, the red and green and the masthead. You think that was done in two seconds? A. Sir?

Q. How did you estimate the time?

A. I would estimate that time not more than two seconds. It's an estimate; that's all.

Q. What first attracted your attention to the north-bound boat? A. Her exhaust.

Q. How far away did you hear that from where you were? [152—83]

A. I should judge possibly a mile, being a still night. Probably it was closer; but it was, I should judge it was about a mile, about, when I first saw, or heard the exhaust, and immediately I took the glasses and tried to locate the boat.

Q. At that time you put the glasses on her?

A. Just as soon as I could pick her up.

Q. You could see that she was northbound?

A. I could see she was northbound.

Q. Could you see the range of her sides, or had she presented her side to you?

A. No, sir; not exactly. She was coming at an angle.

Q. But you could see a good part of her?

A. Sir?

Q. I say you could see a good part of her?

A. Yes; I could see a good part of her.

(Testimony of David Oliver Kinyon.)

Q. So, she was heading in a direction that would bring her abreast of your place, about parallel with Mary Island? A. Yes, sir.

Q. That is to say, she was heading in toward the island, but ranging, say, parallel with the shore?

A. Yes; ranging on their ordinary course, as near as I could tell when she was coming up.

Q. The usual course that is followed by vessels going on down the channel? A. Yes, sir.

Q. Does it occur to you that, it being light, that you perhaps wouldn't observe the lights on her?

A. No, sir; it was not.

Q. In that moonlight? A. No, sir. [153—84]

Q. You looked for them and didn't see them?

A. They were not there; I couldn't see them at all.

Q. Of course, if they had been there, you would have seen them?

A. Most assuredly, I would; yes.

Q. Didn't observe any lights in the port-holes?

A. I observed nothing at all. It was dark.

Q. After the collision, what lights did you see?

A. You mean after they had gotten under way again?

A. Yes. What lights did you observe then?

A. I didn't pay much attention to it then. All I could see after they got past the tower was a part view of the headlight, because they headed up the channel a little ways and the side-lights shut out the view to a certain point aft.

(Testimony of David Oliver Kinyon.)

Q. You remember that the vessels, after they came together, were circling around out there, tied together; that they couldn't go ahead and kept turning around?

A. I don't think that they made a circle; I am not positive as to that; but I don't think that they circled at all.

Q. You know that the "Eagle" hooked on to the "Wildwood" and held her up and when they started ahead, they wouldn't steer and kept turning around for some little time?

A. I didn't see anything of the kind.

Q. You didn't see that? A. No, sir.

Q. Of course, if that had been a fact, you would have observed it?

A. Well, it's possible I wouldn't; I might not, because after the collision I took my megaphone—that is, the station megaphone and wanted to know if they needed any help. I got no reply and then we stood there a minute or two watching them [154—85] and walked back to the house. By that time the head keeper was out and wanted to know what the trouble was, and I told him; so we went back to the house. [155—86]

Testimony of Mrs. Nora Ethel Kinyon, for the Libelant (Recalled).

MRS. NORA ETHEL KINYON, recalled as a witness on behalf of the libelant, having been previously sworn, testified as follows:

Direct Examination by Mr. C. H. COSGROVE.

Q. In your former examination, you said that

(Testimony of Mrs. Nora Ethel Kinyon.)

you saw the north-bound boat turn inshore just before the collision? A. I did.

Q. At about that time, I forgot to ask whether you saw the "Wildwood"; that is, the south-bound boat, make any turn? A. She turned inshore.

Q. They both turned inshore? A. Yes.

Q. Just prior to the collision?

A. Just at that time.

Q. And I understood you to say that it was about five or six hundred feet away?

A. No; I wouldn't think they were that far away.

Q. I mean from where you stood.

A. Oh, it was—yes, about 700, I should think, feet.

Q. Do you consider yourself a good judge of distance? A. Well, for a woman, I do.

Q. Upon what is that based, Mrs. Kinyon?

A. Well, I think men are more familiar with measuring and judging distances than women are.

Q. I mean, have you had any experience in and around lighthouses other than in Alaska?

A. Yes, I have.

Q. Where?

A. In 1903 on Destruction Island. That's five miles off the coast of Washington and it is—

Q. (Interrupting.) How long did you live there?
[156—87]

A. About three years and a half.

Q. And then what other places?

A. Then on Puget Sound at Muckilteo Point,

(Testimony of Mrs. Nora Ethel Kinyon.)

on Possession Sound; really a tributary of Puget Sound.

Q. How long did you live there? A. One year.

Q. And then where?

A. Then at Tree Point, Alaska, sixteen months, North Island for three years and on Mary Island one year, and on San Francisco Bay at the East Brother light station. It is really termed the Two Brothers light, but the island which the light is situated on is East Brother.

Cross-examination by Mr. MARTIN.

Q. Mrs. Kinyon, I should have asked you before, did you observe now on the north-bound vessel, any other lights than these that you told us about?

A. Just three, in my memory.

Q. When they were flashed on, do you recall that you saw all three?

A. Not at the moment that they were flashed on—I wouldn't be certain. But at the moment of the collision, I saw all three lights.

Q. She was how far away then; the north-bound boat? That is, from where you stood?

A. About seven hundred feet, I should think. Of course, it would be a little farther, as they hadn't struck, but it was so very few minutes that the distance would be little different.

Mr. MARTIN.—That's all.

Mr. COSGROVE.—That's all. [157—88]

**Testimony of David Oliver Kinyon, for the Libellant
(Recalled).**

DAVID OLIVER KINYON, recalled as a witness for the libellant, having been previously sworn, testified as follows:

Direct Examination by Mr. C. H. COSGROVE.

Q. I understood you to say, in your former examination, that you saw the north-bound boat, or did you say what direction, if any, the north-bound boat took, just prior to the collision?

A. She turned inshore.

Q. She turned inshore? A. Yes.

Q. I forgot to ask you whether you noticed the "Wildwood" make any turn at that time?

A. She also turned inshore, toward Mary Island.
[158—89]

Testimony of Harold A. Brindle, for Libellant.

HAROLD A. BRINDLE, called as a witness on behalf of the libellant, having been first duly sworn, testified as follows:

Direct Examination by Mr. C. H. COSGROVE.

Q. Please state your name.

A. Harold A. Brindle.

Q. And you live at Ketchikan? A. Yes, sir.

Q. Are you the son of Alexander Brindle, who is the libellant in this case? A. Yes, sir.

Q. Were you in charge of the "Wildwood" last summer? A. I was.

(Testimony of Harold A. Brindle.)

Q. Were you in charge of her on the 23d of July? A. I was.

Q. Were you on board of her on the night of the 23d of July? A. Yes, sir.

Q. You remember the collision, then, do you, between the "Wildwood" and the "Eagle"?

A. I certainly do.

Q. Kindly tell the Court, as briefly as possible, the circumstances of the collision, as you remember them.

A. Well, about an hour before that I had gone down below. I was reading for a while and I told the fellow that was the captain of the boat to call me when we got to Mary Island light—

Q. (Interrupting.) What light?

A. Mary Island light. Some time later he called me and told me that we were pretty near the light and what course to take and I told him I would be up in a minute, and I drank a cup of coffee, and pretty soon he called me again and [159—90] I could tell by his voice that there was something wrong, and I immediately grabbed my cap and I was up in about a jump. I was pretty near on deck when she hit. The other boat was right alongside on the port side. The only thing I could see on the other boat was the red port light. That was burning at the time she hit. As soon as she hit, I went down to the engine-room. Well, before I went down to the engine-room, I looked to see whether the lights on the "Eagle" were burning. I could see the red light was burning be-

(Testimony of Harold A. Brindle.)

cause I passed right alongside of the red light when I went down.

Q. Was that before or after the collision?

A. That was after the collision. I was going to stop the engine.

Q. Any lights burning on the "Eagle" at that time? A. Yes.

Q. Did you go aboard the "Eagle"?

A. I did after the boat sank.

Q. Whom did you meet aboard the "Eagle"?

A. How's that?

Q. Whom did you meet aboard the "Eagle"?

A. I met Steve Selig and Al Ames, and I don't know, a Swede by the name of Joe, Joe Olander.

Q. Did you notice anything unusual about that time aboard the "Eagle"?

A. I noticed that Al Ames was drunk. I knew they had whiskey aboard, because I saw it.

Q. Did you go into the pilot-house?

A. I did.

Q. What did you see there, if anything?
[160—91]

A. In the pilot-house there was several empty bottles laying on a bunk back in the pilot-house. Smelling very strongly of whiskey.

Q. Did you talk with Al Ames?

A. I did after everything was made fast. I said, "Couldn't you see our red light"? and he said, "Yes, I saw your red light." I said, "Why didn't you keep away from it?" and he wouldn't answer me. Well, in about a few seconds, Olan-

(Testimony of Harold A. Brindle.)

der he walked off to the stern of the boat, alongside of the tow-line, a kind of a dangerous position to stand in because if the line pulled across or slipped, it might have thrown him overboard, and I told him he better get out of there, and he didn't say anything; so that's about the only time I spoke to him.

Q. And you say he was drunk?

A. He sure was.

Q. What was his position aboard the "Eagle"?

A. Well, at that time, according to this Joe, whatever his name is, Joe Olander, I think it is, he told me that Al Ames, up to the time that he saw our boat and when she was about twenty feet from the "Wildwood," he took the wheel out of Al Ames' hands and put her in reverse. Well, as a matter of fact, I know that he didn't put her in reverse, because—

Q. I knew it was some time after he hit when he put her in reverse. [161—92]

Q. Do you know whether one was made?

A. Yes.

Q. Do you know what that estimate is?

A. \$200.

Q. Now, then, what was the result of that accident, so far as your business is concerned, in which you were engaged at that time?

A. Well, it just put us out of business.

Q. The boat was brought to Ketchikan?

A. Yes, it was brought to Ketchikan by Steve

(Testimony of Harold A. Brindle.)

Selig and put in the creek where we took the fish out of her. [164—95]

Q. Did you make any effort to get any other boat to continue the business?

A. Well, at first I asked Steve Selig if he would take those fish to Prince Rupert, and he told me he was going to Prince Rupert that day. As a matter of fact, I know that he didn't go to Prince Rupert until the next day, but he wouldn't take the fish, so I had to rustle around and get the fish to Prince Rupert.

Q. Did you attempt then to get another boat to take its place?

A. Yes I spoke— There's three different boats I tried to get and neither one was available. I tried to get the "Venus" and the "Progressive" and I tried to get the boat owned by the Southern Alaska Canning Company, of about the same size as ours. [165—96]

Q. Mr. Brindle, who was with you on board the boat at the time of the collision? A. Leo Ryan.

Q. You say you were in charge of her?

A. I was in charge from the owner.

Q. You were in charge from the owner?

A. Yes.

Q. That is Mr. Alexander Brindle?

A. Yes, sir.

Q. How old are you? A. Nineteen years old.

Q. Then you are not the registered master of the vessel?

A. I was not the registered master, no.

(Testimony of Harold A. Brindle.)

Q. And Mr. Leo Ryan, I believe was.

A. F. Ryan.

Q. Huh? A. F. Ryan.

Q. F. Ryan. How old is he?

A. I don't know; I never asked him his age.

Q. He is around here?

A. I guess he's in the back room or somewhere around. [171—102]

Q. You left Ketchikan that night at what time?

A. Well, maybe one or two minutes past seven o'clock in the evening.

Q. What time did this collision occur?

A. Well, as close as I can figure, it occurred between five minutes past ten and twenty minutes past ten.

Q. How far away was the "Eagle" when she was first observed?

A. I didn't observe it; I can't tell.

Q. You don't know except as you get it from Mr. Ryan? A. Yes.

Q. You were down below? A. Yes.

Q. As a matter of fact, you were lying down in your bunk, asleep? A. I was not.

Q. Didn't have to be wakened or called?

A. He just called, to get the course. He said, "What's your course from Mary Island to Tree Point?" and I said, "I'll be up there just as soon as I have a drink of a cup of coffee." That was about a quarter to ten.

Q. When he asked you for the course?

(Testimony of Harold A. Brindle.)

A. Yes. I told him to call me when he got to Mary Island.

Q. Did you keep a log of your trip?

A. We always keep a log of the trips.

Q. Did you make a log-book entry of it?

A. No; I didn't enter every point we went by. I just used the log for one or two points, depending on how the weather was. I kept a log of the running hours and always figured on my oil.

Q. You personally, then, don't know anything about the conditions out there that evening, how far away the vessel was [172—103] what course you were steering or what course the other vessel was steering?

A. I don't know what course the other vessel was steering, but I know what course we were steering.

Q. You know what course you gave him?

A. Yes.

Q. You don't know as a matter of fact what course you were actually steering, do you?

A. Well, I know when he came down, I got out of my bunk and looked over and I could see just where it was. I know he wasn't yet to the light. I know approximately where he was.

Q. What course did you give him?

A. I gave him southeast, half east.

Q. Southeast, half east? A. Yes.

Q. That course would take you how far off Mary Island?

A. You're supposed to take that light. That

(Testimony of Harold A. Brindle.)

course is from Mary Island light down to Tree Point.

Q. That is, how far did that course actually carry you off Mary Island? That is the course he was running?

A. You wouldn't take that course until after you got off the lighthouse.

Q. How far— When you gave that course, how far off were you?

A. I should say seven or eight hundred feet, maybe a little bit farther; maybe a little closer.

Q. You didn't go up on deck?

A. I looked outside, between Twin Island and Mary Island, between—well, I'd say, less than a quarter of a mile from the light.

Q. When you came down from Ketchikan, approaching Mary Island, [173—104] on what side did you pass Twin Island?

A. I told them to go outside of Twin Island, outside of Hog Rocks, or on the side away from the island.

Q. You mean outside—

A. I took the steamboat course.

Q. Did you pass Twin Island on your starboard or port side?

A. I passed Twin Island on my starboard side.

Q. Starboard side? A. Yes; going south.

Q. I see. How did you first know that there was another vessel approaching?

A. Well, when I first found out was just as I stepped out and saw her hit her.

(Testimony of Harold A. Brindle.)

Q. You saw the collision? A. Yes.

Q. So that you personally don't know what transpired on deck, do you?

A. No, not until after it happened.

Q. Then you went aboard the "Eagle"?

A. I did not. I went out and then I went down and threw out the clutch, stopped the engine and I took some lines on the "Wildwood," made them fast and I passed them on to the "Eagle," and they made them fast.

Q. They helped you, of course?

A. Yes, by giving advice and making the lines fast.

Q. Then you say that you went aboard?

A. Yes.

Q. And you went down into the "Eagle's" cabin.
[174—105]

A. I didn't say that I went down into the "Eagle's" cabin.

Q. Oh, you didn't?

A. No, I haven't said that yet.

Q. Well, did you? A. Yes, I did.

Q. You say that you observed Al Ames drunk?

A. I did.

Q. Didn't take any samples of the liquor, did you?

A. No, but it was offered to me, if I wanted it.

Q. But you don't know what it was.

A. I know whiskey when I smell it.

Q. You didn't get any? A. Huh?

Q. You didn't get any? A. No; I didn't.

(Testimony of Harold A. Brindle.)

Q. And all, then, you have got to go by is that you think he was drunk?

A. I don't think he was drunk; I know he was drunk.

Q. You know that he was drunk? A. Yes.

Q. That is your own fair statement. You want the Judge to believe that this man was drunk?

A. I certainly do.

Q. And you and your own men were all right?

A. Well, I know we weren't drunk.

Q. What time did it occur, the collision? What time did the boats come together?

A. The exact minutes?

Q. Yes.

A. Well, I don't understand the question. What time in the evening? [175—106]

Q. I said, what time did the collision, did these vessels collide?

A. Between a quarter past and twenty minutes past ten. That is as close as I can give it to you.

Q. How far away were you at that time from Mary Island?

A. Oh, I should judge about seven or eight hundred feet, or something like that, offshore.

Q. How much sleep did you get during the twenty-four hours [176—107] immediately before this collision?

A. Well, we left Port Conclusion at about two in the afternoon and I judge I slept from six o'clock that evening— Well, I didn't sleep either. I laid down from six o'clock that evening to about

(Testimony of Harold A. Brindle.)

nine, I guess it was. Then I took the wheel till about twelve, and then I slept; then I took the wheel at about two in the morning and then I slept from two in the morning to about half past nine; half past eight. Then I took the wheel. I cooked breakfast and Leo went down to sleep at half-past eight, and I should judge he slept the rest of the way into town. So I guess I must have had about six hours and a half of sleep, seven hours' sleep. [177—108]

Redirect Examination by Mr. COSGROVE.

Q. Have you had much experience on gas boats?

A. I have been on gas boats ever since I have been six years old.

Q. Thoroughly familiar with the business?

A. Quite well.

Q. And navigation?

A. Well, I know how to handle them. I don't know deep sea navigation.

Mr. COSGROVE.—That's all.

Recross-examination by Mr. MARTIN.

Q. You are familiar with the cruising rules, the collision rules? A. How is that.

Q. The collision rules. A. Yes. [191—124]

Q. Do you know about the passing rule?

A. Yes, sir.

Q. What is your duty in passing vessels, when you are in line so as to be end on?

A. How is that?

Q. I say, meeting, now, under the passing rules, what is your duty as a gas boat man?

(Testimony of Harold A. Brindle.)

A. In passing a vessel?

Q. Yes.

A. It depends upon how far you are going to pass her.

Q. What is your duty?

A. You're supposed to give her a whistle the side you want to pass.

Q. Which side do you pass?

A. If I was a half a mile off some boat's starboard side, I would pass on the starboard side; but if I was coming head on, or about so, and wanted to pass on the port side, I would pass on the port side by giving one whistle.

Q. Well, now, we'll assume that there are two vessels meeting end on. What is your duty?

A. Meeting head to head?

Q. Yes; head to head.

A. Well, supposing they were going to collide?

Q. No; I said what is your duty when you see a vessel coming towards you, right in line with you, head on?

A. Blow one whistle and put your helm hard to port.

Q. What is your duty under the crossing rule?

A. Crossing a boat's course?

Q. Yes. [192—125]

A. Well, it depends on which way you are going to cross, whether you had a right to cross. If you were running on a southerly course and a boat was cutting across your bow and she would be showing a red light and you would be showing a green

(Testimony of Harold A. Brindle.)

light, and if you hit her, you would be liable. You can't proceed. But she's supposed in that case, to stop, back up and get out of the way whichever way she can. You're supposed to keep a straight course.

Q. You are supposed to keep a straight course, now, when you see a vessel coming from which direction?

A. Well, suppose, you're running south, that vessel would be coming, running on a southerly course, she'd be coming approximately—

The COURT.—(Interrupting.) What's the purpose of this examination? He is not the captain of the boat. He wasn't in charge of the boat at the time of the collision.

Mr. MARTIN.—Only, your Honor, it may be material perhaps in the examination of the other witnesses, depending upon this man's testimony. This young man has answered Mr. Cosgrove that he was an experienced gas boat man. He stated just now that he had been on gas boats all his life and is familiar with the rules of the road.

The COURT.—You want to test his familiarity?

Mr. MARTIN.—Yes.

The COURT.—I don't see the materiality of it. He was not in charge of the boat, and not knowing any of the circumstances, not being in charge of the vessel at the time, I don't think it is material.

Mr. MARTIN.—At this time I move, for the purposes of the record, to strike out all the witness' testimony, to strike out from the witness'

(Testimony of Leo Frank Ryan.)

testimony all the statements made by [193—126] him as to these speculative or fanciful profits. There is no true measure of damages shown; there is no true measure of loss.

The COURT.—You may put your motion of record. Dictate it to the reporter. I will deny the motion at the present time.

Mr. MARTIN.—Your Honor will give me an exception, please.

The COURT.—Certainly.

(Witness excused.) [194—127]

Testimony of Leo Frank Ryan, for Libellant.

LEO FRANK RYAN, called as a witness on behalf of the libellant, having been first duly sworn, testified as follows:

Direct Examination by C. H. COSGROVE.

Q. Please state your name.

A. Leo Ryan; Leo Frank Ryan.

Q. Where do you live?

A. Lived in Ketchikan for the past—

Q. (Interrupting.) How long have you lived here?

A. For three and a half years.

Q. What is your business?

A. Well, I work in shipyards. That's been my business most of the time; work in shipyards and around these small gas boats pile-drivers; places like that.

Q. Were you master of the gas boat "Wildwood" on the 23d of last July? A. I was.

(Testimony of Leo Frank Ryan.)

Q. At the time the "Eagle" collided with her off Mary Island? A. I was.

Q. At that time who was aboard with you?

A. Harold Brindle.

Q. About what time in the evening did it occur?

A. About ten twenty.

Q. And where?

A. Just past Mary Island light.

Q. How long had you been on the "Wildwood" before the collision? A. About three hours.

Q. What time did you leave Ketchikan that day?

A. About seven o'clock; seven o'clock exactly.

Q. You keep a log-book? [204—137]

A. We had a log-book aboard.

Q. You know what has become of it?

A. I don't. I never seen it since the accident.

Q. Have you learned what became of it?

A. I have not.

Q. Anybody told you what became of it?

A. So far as I can make out, it must have been lost.

Q. You started from Ketchikan at what time, did you say?

A. Seven P. M., the night of the 23d.

Q. You remember what course you took from Ketchikan? A. I pursued several courses.

Q. Well, before you reached—headed down the channel, bound for what place?

A. Bound for Prince Rupert.

Q. Now, did you have your lights burning?

A. All the lights were burning.

(Testimony of Leo Frank Ryan.)

Q. Now, just tell the Court what happened. Tell the circumstances of the collision; what you remember about it. A. About seven—

Q. (Interrupting.) Let me ask you this question first: What sort of night was it? What were the weather conditions? A. Moonlight night.

Q. Water smooth?

A. Water was perfectly calm.

Q. Clear? A. Clear night.

Q. Just go ahead and tell what happened.

A. Well, about six or seven minutes before we got to Mary Island light, I went down and hollered to Harold—he asked me to [205—138] call him when we got to Mary Island—and I also asked him the course from Mary Island to Tree Point. He was down there where he had a light handy, and I didn't want to light the light in the pilot-house to look it up in the little log-book. He gave me the course and I went back and put her on the course he give me and was holding her on that course, when all of a sudden I thought I seen a shadow ahead and just then the lights of a boat flashed on, headed straight at me on the port bow. I seen the headlight and the two side lights of the boat. I seen them all at the same time, and I promptly swung the helm to port, which put the boat to starboard, and she rammed us right there.

Q. When you put your helm to port and swung her to starboard, that would head you, so far as Mary Island is concerned, would it head you toward the island or out from the island?

(Testimony of Leo Frank Ryan.)

A. It headed about toward the island.

Q. Toward the island? A. Toward the island.

Q. What did you notice the other boat do?

Which way did she swing?

A. She swung toward the island, too.

Q. She swung toward the island, too?

A. Yes.

Q. And hit you? A. Yes.

Q. Where did it hit the "Wildwood"?

A. About eight feet from the stern on the port side.

Q. Now, how long before she struck you did you see her flash her lights on?

A. Not more than three or four seconds. [206—139]

Q. When did you first see her?

A. Well, I wasn't positive that it was a boat until the lights flashed on. It was just about, maybe a half a second or a second before the lights flashed, because I had just noticed it.

Q. How far, in your judgment, was she away from you when she flashed on her lights?

A. Not more than 125 feet, I don't think; about a hundred or a hundred and twenty-five feet; possibly less.

Q. What happened after the collision?

A. Well, after the collision, I hollered to Harold at the time of the collision and he came out, and he hollered to me to get aboard the other boat, and after I got out of the pilot-house and went on the other boat and we put lines on the "Wildwood"

(Testimony of Leo Frank Ryan.)

and got her in tow and headed for Ketchikan. We were undecided for some little time whether to take her to Customs-house Cove or to Ketchikan and finally decided on towing her to Ketchikan.

Q. When you went aboard the "Eagle," what part did you go on?

A. Walked toward the tow bitts on the after-end of the "Eagle."

Q. Did you meet any of the crew?

A. I met two of the crew.

Q. Which ones?

A. Al Ames and the other gentleman, I don't know.

Q. What position did Al Ames occupy aboard the ship? A. Deckhand, I presume.

Q. Al Ames?

A. Well, he was at the wheel at the time of the accident.

Q. Did you notice his condition as to sobriety?

A. He was drunk. [207—140]

Q. Did you have any conversation with him?

A. Well, I did; yes; that is, in a way I did. Harold and I—Harold asked him if he seen our port light, and he stated he didn't see our port light. Another thing he did, he walked out to the stern of the "Eagle," in a very dangerous position because those lines were awful tight and it was swinging first one way and then another, on account of being submerged under water, and if one of those lines would have swung one way or the other, it might have thrown him overboard. He stood there

(Testimony of Leo Frank Ryan.)

and didn't seem to notice his danger, and seemed to be very drunk. He stood on the deck, over by the starboard side of the "Eagle," and he was speaking to us afterward and he was swaying from side to side.

Q. Were you in the pilot-house of the "Eagle"?

A. I stepped into the pilot-house for a little while.

Q. What did you notice there?

A. I noticed six or seven empty bottles, beer bottles.

Q. About how far off Mary Island shore were you at the time of the collision, if you can give us your judgment?

A. I don't know the exact distance offshore, but it wasn't no great distance, probably between 500 and a thousand feet. I hadn't noticed it. I am not sure just exactly what the distance is—somewhere around there.

Cross-examination by Mr. MARTIN.

Q. Mr. Ryan, how old are you, sir? [208—141]

A. Twenty years of age.

Q. Where were you born?

A. I was born in Muskegon, Michigan.

Q. When were you twenty?

A. September 4, 1921.

Q. You had not then reached your twentieth birthday?

A. I hadn't reached my twentieth birthday.

Q. What has been your experience with gas boats?

A. Well, I worked around for J. L. Smiley at Charcoal Point, and I worked on other boats, a day

(Testimony of Leo Frank Ryan.)

or two here and a day or two there. I worked on the "Wildwood" previous two months, and I was on several small gas boats. [209—142]

Q. The "Wildwood" last February was placed in your charge, wasn't she? You made out, or took out your master's certificate or made a statement that you were in charge of the "Wildwood" last February? A. I did.

Q. A year ago? A. Yes.

Q. You had never been master of the "Wildwood" before that? A. No.

Q. You served on her, then, for about two months?

A. About two months.

Q. Had you ever been, before that, master of any vessel? A. I had not.

Q. That was your first experience?

A. First experience.

Q. How long had you served on gas boats before going on as master of the "Wildwood" in February?

A. Probably six months on different boats.

Q. Boats as large as the "Wildwood"?

A. Smaller boats than the "Wildwood."

Q. The "Wildwood" is a vessel 45 feet over all, isn't she? A. Forty-five feet over all.

Q. Now, what vessels did you serve on?

A. Well, I served on a little boat over at Smiley's that belongs to W. It's a boat 32, 33 feet long.

Q. What was her name?

A. There was no name on it. It was No. 5.

Q. That is a little trolling boat? [210—143]

A. Small trolling boat.

(Testimony of Leo Frank Ryan.)

Q. And you served on what other boats?

A. Well, I have been on the "Olympic," at J. L. Smiley's cannery, several times, for a day or two at a time.

Q. And so, Mr. Ryan, except for a day or two at a time for a few months before last February, you have had no experience on boats?

A. On large gas boats?

Q. Yes. A. No.

Q. Then you stayed on her two months and went elsewhere and were away from the "Wildwood" for some little time? A. I was away.

Q. When did you join the "Wildwood"—just immediately now before the voyage on which the collision occurred? A. About twelve days before.

Q. The "Wildwood" makes what rate of speed?

A. About seven and a half knots an hour.

[211—144]

Q. That would be a speed of about a little over eight miles an hour? A. Little over eight miles.

Q. Eight land miles. Were you going full speed at or before the collision?

A. I was. Well, we wasn't going—we could have gave her probably a trifle more if we wanted to or had to in a pinch, but we were going at the customary full speed?

Q. Customary, usual rate of speed? A. Yes.

Q. That would be a little under your maximum of seven and a half knots an hour?

A. We was going at about the rate of seven and a half knots an hour then.

(Testimony of Leo Frank Ryan.)

Q. You say you called down below to get your course from Mr. Brindle, young Mr. Harold Brindle?

A. I called down below to wake him up. He was asleep and I also asked him the course, but I didn't call exactly for the course, because he was coming on watch anyway.

Q. Then, you didn't know the course very well?

A. I didn't know the course.

Q. Sir?

A. I didn't know the course up until the time I asked him.

Q. You passed off Mary Island just before the collision at about what distance?

A. We hadn't passed.

Q. How far—I'll put it this way. How far off Mary Island were you when the collision occurred?

A. Well, as I stated before, I don't know the exact distance. [212—145]

Q. What is your estimate?

A. Between—I wouldn't make any estimate, because I really don't know, but it was between 500 and a thousand feet; somewhere around there.

Q. Wouldn't be more nearly a mile?

A. No; I don't think it would.

Q. Isn't that the course usually pursued by vessels that go down Revillagigedo Channel, making for Tree Point, on the way to Prince Rupert? Don't they usually keep about a mile off Mary Island in making their course?

(Testimony of Leo Frank Ryan.)

Mr. COSGROVE.—Are you referring to the steam boat course, or small vessels?

Mr. MARTIN.—Small vessels; small vessels of the type of cannery tenders and gas boats.

A. Well, I don't know, because I only made one previous trip, and I took the same course the trip before.

Q. Do you know that there is a reef that makes out from Mary Island that runs out there about 700 feet, just this side of the lighthouse?

A. I hadn't noticed it on the chart.

Q. You hadn't noticed that?

A. I hadn't noticed it.

Q. Of course, if there was such a reef, it is reasonable and fair to keep some distance outside of it?

A. It would be if I knew it was there.

Q. How?

A. If I had known the reef was there, I would have kept clear of it.

Q. You say, Mr. Ryan, that you saw the outline, the shadow, [213—146] the outline of the boat that you learned afterwards was the "Eagle," the colliding boat, some few seconds before the lights were flashed on?

A. About a second before the lights were flashed on; then saw the shadow.

Q. You saw the shadow? A. Yes.

Q. What was the condition of the moon?

A. Well, the moon was—

Q. (Interrupting.) High up in the heavens or low down on the horizon at that time?

(Testimony of Leo Frank Ryan.)

A. I hadn't paid any attention particularly to the moon at that time, but I know it was pretty high.

Q. It was pretty high?

A. Yes, because an hour before I had noticed that it was up above the mountains.

Q. Up above the mountains an hour before?

A. An hour before.

Q. Do you know how fast the moon travels in its transit from the horizon to the zenith?

A. I never figured it out. I don't know because I have never figured it out.

Q. Where would you say the moon was with reference to being halfway up, keeping in mind now the distance from the zenith right overhead, down to the horizon, whether it was half way up, three-quarters, or one-quarter?

A. Well, I'd say it was halfway at least. [214—147]

Q. What quarter of the moon was it—that is, how large was the moon; that is, having in mind, now, the size of the moon as you know it in the heavens when it is full or when it is a new moon, or the first quarter or the last quarter?

A. It was nearly a full moon.

Q. Was it a clear night?

A. It was a clear night.

Q. Sea was calm? A. The sea was calm.

Q. And nearly a full moon. If you had been alert and had been looking, you would have seen the hull of the "Wildwood," or rather the hull of the

(Testimony of Leo Frank Ryan.)

“Eagle” some distance away, wouldn’t you, a half a mile away or a mile?

A. I don’t know as I would, because when I was looking out at night, I expected to see lights, if there was a boat in the distance.

Q. Yes, but with a moon, now, nearly full and half way up on the horizon, clear night, not obscured, you could see the outline of the “Eagle” on the water some distance away, couldn’t you?

A. If I had been looking over my port bow and watching closely, I might have seen it. [215—148]

Q. But you know, from your experience on the water, that on a moonlight night you can see a vessel on a clear night, some distance away, several miles away, if you are looking for it? A. No.

Q. On this occasion, you did, however, see her, as you say, one, two or three seconds before?

A. I didn’t know whether it was a big log or a boat or just a shadow on the water, until the lights flashed on her, on the boat.

Q. Were you able to make out the outline of this boat in the moonlight before the lights were flashed on?

A. The lights flashed on so quickly after I seen the shadow that I didn’t get a chance to examine or look real closely for the mast or the pilot-house.

Q. You think that the “Eagle” was 125 feet away from you?

A. Somewhere in that region; hundred, hundred and twenty-five feet.

(Testimony of Leo Frank Ryan.)

Q. Your boat would travel how many feet per second at the rate of seven and a half knots an hour?

A. Well, I have never figured it up.

Q. Well, that is a matter of easy computation?

A. Well, I don't—

Q. It would be approximately ten or eleven feet a second. Now [216—149] if you had to go a distance of a hundred feet, traveling at that rate of speed, it would be about ten seconds, wouldn't it?

A. About ten seconds?

Q. Before you would have met up with the other boat?

A. If the "Wildwood" goes ten or twelve feet a second.

Q. You put the wheel hard to port, didn't you—you put your helm to port?

A. I put the helm to port.

Q. And in putting it to port, you would, of course, roll it down to the starboard side? A. Yes.

Q. That would take your vessel to the right?

A. Took my vessel to the right.

Q. Where, with reference to the line of your bow, was the "Eagle" when you first observed her?

A. Off the port bow of the "Wildwood."

Q. Well, the port bow may be considered as the line from the keel around to a point nearly abeam, may it not?

A. Well, I would say right about port quarter.

Q. How?

(Testimony of Leo Frank Ryan.)

A. I would say, then, port quarter on the bow. It was about six feet back from the bow on the port side, right over there that I seen her.

Q. Where did she hit?

A. She hit eight feet from the stern

Q. Yes, but now, keeping in mind the line of your keel—

The COURT.—(Interrupting.) He answered that question by [217—150] saying that it was about six feet from the stem of the boat on the port bow. That is when he first saw her.

Mr. MARTIN.—That, your Honor, would not be very definite—six feet.

Q. Do you mean at an angle, or measured about six feet right at the bow of your vessel?

A. Well, looking from the middle of the boat, straight above the keel, looking at the front window, it would be about six feet from the stem on the port side.

Q. Do you know what distance a compass point would make on the horizon on your boat—one point on your boat?

A. I don't know exactly.

Q. How many compass points would it be from the bow around to a point abeam?

A. It would be eight points.

Q. And halfway from your bow to abeam, looking on the line of the keel, halfway would be four points? A. Yes.

(Testimony of Leo Frank Ryan.)

Q. Or an angle of 45 degrees.

A. Or an angle of 45 degrees.

Q. And from that point halfway, that 45-degree angle, there would be four compass points between there and the bow, wouldn't there?

A. There would.

Q. Now, you say you saw the "Wildwood" or rather the "Eagle" how many compass points on your bow?

The COURT.—Off your bow. [218—151]

Mr. MARTIN.—Yes; off your bow.

A. About two points.

Q. When the lights were flashed on, you saw all three lights, you say?

A. Three lights on the gas boat "Eagle."

Q. That is, you saw the green light and the red light and the white mast headlight, white mast headlight? A. Yes; the white mast headlight.

Q. Well, then, she couldn't have been quite so far over to the right, or off, rather, to your left, because you wouldn't have seen all three lights if she was.

A. She was coming towards me at such an angle that I couldn't see them all, and she was headed for the port bow, as I said.

Q. But according to your estimate, the bow of your vessel would only have to veer so that it was—to get this clearly—I withdraw that question. Using this (showing) by way of illustration, let this line represent the line of your keel, and the line of my brief case represent your beam. Four compass

(Testimony of Leo Frank Ryan.)

points would be halfway between, wouldn't it? or a 45-degree angle from the line of your keel?

A. Uh-huh.

Q. And two points would be half of that?

A. Half of that.

Q. Or a line twenty-two degrees and thirty minutes; 23 degrees from the line of your keel, she only had to veer that distance to miss this vessel. If she was two points on your [219—152] bow, you only had to veer or swing two points to clear her?

A. Two points would have cleared me.

Q. Would have cleared you; yes.

A. Providing that the other boat did the same.

Q. Now, the other boat hit you on the port side aft? A. Yes.

Q. The other boat did the same thing that you did, didn't it?

A. The other boat went over to its right; to its starboard? A. No; it came to its left.

Q. It came to its left? A. It did.

Q. How would it, being only two points on the bow when you first observed her, how did it get down here, hit you way down aft, on the stern, if you had been swinging to the right and if she had been swinging to the right? In other words, to be fair about it, wouldn't that indicate, as you were struck, that the colliding vessel had likewise swung to her right and nearly cleared you? In fact, if she had gone about eight feet farther, she would have gone around your stern, on your port side. Wouldn't it so indicate?

(Testimony of Leo Frank Ryan.)

A. Well, I can't say that it would.

Q. Well, if he had gone to his left at the point where you first observed him, two points off on your port bow, would he crash into your bow forward of the beam? Wouldn't he have crashed into your side somewheres about amidships?

A. He would have; yes.

Q. How?

A. He would have, if I hadn't altered my course.
[220—153]

Q. Well, don't you think that you had a chance to get out of his way in the hundred or hundred and twenty-five feet that you had to go?

A. Well, I don't know that I did have a chance, because I did the best that I could by throwing the boat hard to starboard and if he did the same thing, probably we wouldn't have had the collision.

Q. Well, you said a moment ago that you threw your wheel hard aport.

A. No; I said that I threw the boat hard to starboard.

Q. Do you mean that your boat went to starboard or went to port?

A. The boat went to starboard?

Q. The boat went to starboard? A. Yes.

Q. That is, you put your wheel hard to port and your boat went to starboard? A. Yes.

Q. You say, to the best of your judgment at this time, that you were only a thousand feet off Mary Island?

(Testimony of Leo Frank Ryan.)

A. I said it was between five hundred and a thousand feet.

Q. Between 500 and a thousand feet? A. Yes.

Q. Do you recall making the statement to the Collector of Customs, in answer to a question, that you were one mile off Mary Island?

A. Well, I may have imagined that then, but I didn't know the difference, and I never thought about it when I gave that.

Q. Well, you recall making that statement don't you? A. I recall putting it down. [221—154]

Q. You put it down in writing, over your own signature, that you were a mile off Mary Island when this collision occurred?

A. I put it down as about a mile, if I am not mistaken.

Q. In answer to rule 24, or question 24, report of casualty, the question being thus: "Locality of casualty, giving precise point of land or other obstruction, in case of stranding," and you answered, "One mile off Mary Island light." Do you recall that?

A. Well, I recall putting in one mile, but I thought that I put it about one mile.

Q. Well, if you said at that time one mile, would your judgment then be more accurate than it is now?

A. Well, I don't know, because I did not pay any attention to Mary Island after the accident occurred.

Q. You say, after putting your wheel over and

(Testimony of Leo Frank Ryan.)

the vessel, the two vessels came together, that you went aboard the "Eagle"?

A. I went aboard the "Eagle."

Q. Did you then immediately go into the pilot-house?

A. No; I went down to the stern of the "Eagle" and helped take in the anchor line that we made fast to the "Wildwood" to tow her with.

Q. Well, you were on deck, weren't you until the boats had been made fast and the work was nearly done? A. I was.

Q. Your observation that Mr. Ames was drunk is based upon your ability to look at him, size up his appearance out there in the darkness on the deck? You didn't go in under the light, did you? [222—155]

A. I'm sure he was drunk, and it wasn't so dark but that I could tell he was drunk.

Q. Well, Mr. Ames is very taciturn, silent sort of man, isn't he?

A. Well, I don't know. I have never met Mr. Ames before nor since.

Q. You never met him? A. Never met him.

Q. You don't know that his habit is to habitually keep quiet and say but very little to anybody? A. No; I don't.

Q. You don't know that. What was there in his appearance that indicated that he was drunk—incoherent speech?

A. Not in his speech exactly, but the way he walked and he tried to roll a cigarette and he was

(Testimony of Leo Frank Ryan.)

trembling, and then standing in a dangerous position on the boat.

Q. That would be quite natural under the circumstances, in the excitement attending the collision, wouldn't it?

A. Yes, but I could smell alcohol on him, too.

Q. Now, isn't that really to be fair about it, isn't that Mr. Brindle's suggestion? Didn't Mr. Brindle look at him and say, "They have come from Prince Rupert; they have got whiskey aboard"?

A. Mr. Brindle came back and asked me—he says, "Do you smell any booze around here?" and I stepped up—I just happened to step over by Al Ames at that time and I smelled it and I said, "I do," and I watched him very closely.

Q. Mr. Brindle, in fact, said, "She's just come from Prince Rupert and she's got booze aboard. Let's look for it." Didn't he? [223—156]

Q. He didn't. I don't remember him saying that to me.

Q. Didn't he say that to either Mr. Selig or Mr. Ames?

A. I didn't hear him make such a remark.

Q. Didn't he, in his anger, when the vessels came together and in the excitement of the collision didn't he say that "the reason these two vessels came together is you fellows have been down to Prince Rupert and run me down? You have got liquor aboard this craft"?

A. He said—

(Testimony of Leo Frank Ryan.)

Q. (Interrupting.) Or words to that effect?

A. He said the helmsman was drunk and he told Mr. Selig that and Mr. Selig stated that he wasn't drunk.

Q. Mr. Selig, however, denied at all times and right then on the spot that there was any liquor on board his vessel? A. No.

Q. He didn't? A. He did not.

Q. You didn't see any liquor there?

A. Well, I seen a whiskey bottle aboard, one-half or two-thirds full of whiskey, in the forecastle.

Q. You knew what was in it?

A. I can smell whiskey.

Q. Don't you know that in that bottle there was acid, that it was a bottle of acid, and that there was no whiskey there?

A. Mr. Selig wouldn't have drank it, if it was acid, I'm sure.

Q. How?

A. I say, Mr. Selig wouldn't have drank it if it was acid and he wouldn't have offered me a drink.

Q. Sir?

A. And he wouldn't have offered me a drink.
[224—157]

Q. Didn't he tell you at the time, "Here. If that's whiskey, taste it and see if it is"?

A. I didn't say anything to him. He took the bottle down and asked me if I wanted a drink, and I said, "No."

(Testimony of Leo Frank Ryan.)

Q. The wheelsman, by putting his wheel over—the two vessels came together down on the port quarter, about eight feet from the stern, didn't they? A. Yes.

Redirect Examination by Mr. C. H. COSGROVE.

Q. When you testified about the boat going seven and a half knots an hour and traveling ten or twelve feet a second—

The COURT.—(Interrupting.) He didn't testify to that. Counsel asked him—

Mr. MARTIN.—(Interposing.) I asked him if that was so, if that wouldn't be the computation.

Q. Just one further question. When you signed on as master of that boat in the customs-house, were you asked what your age was?

A. I was not.

Mr. COSGROVE.—We wish to offer a copy of the pilot rules if your Honor please, and have them marked Libellant's Exhibit "A."

(Pamphlet containing pilot rules, etc., received and marked.)

Mr. COSGROVE.—I think that this is our case.
[225—158]

Testimony of A. J. Inman, for Libellant.

A. J. INMAN, called as a witness on behalf of the libellant, having previously been sworn, testified as follows:

Direct Examination by Mr. COSGROVE.

Q. Mr. Inman, the other day, when you testified

(Testimony of A. J. Inman.)

as to the estimate you made for the repair of the "Wildwood," you stated you didn't have your figures with you, but you thought you could find them. Have you found them?

A. Yes. (Looks through wallet.)

Q. What is your total bid? A. \$1328.30.

Q. I want now to ask you whether you found the keel of the boat cracked? A. I did.

Q. Did you make a further examination of the boat since the one that you mentioned in your testimony yesterday?

A. Yes, I had a good look at it again yesterday.

Q. Is the keel cracked? A. Yes.

Q. Are you sure of it? A. I know it.

Q. Let me take your statement. (Witness hands statement to counsel.) Does this statement contain the items upon which your bid of \$1,328.30 is based? A. It does.

Q. I would ask that this bid or document be marked Libellant's Exhibit No. 2. I offer it in evidence, if your Honor please. (Hands statement to opposing counsel.)

Cross-examination by Mr. MARTIN.

Q. I see you have a new keel, 8x10x40? [226—159]

A. Yes, sir.

Q. Could that keel be spliced?

A. Yes, it could.

Q. In that event you wouldn't have the item that you put down for a new keel?

(Testimony of A. J. Inman.)

A. Well, now, I figure maybe different than some people, but I figure it would cost a little money to splice that keel and make it strong. I figure it would cost more than it would to put a new one in. That's the way I figure.

Q. Do you know whether that keel was split or cracked before the collision?

A. No, I can't state that.

Q. You wouldn't be able to say as to that?

A. I wouldn't be able to say.

Q. It is barely possible that, having grounded or struck on some rock or something of that kind, it might have been there for some years?

A. It could be.

Q. Huh? A. It could be.

Q. Is there anything to indicate that it is a new break?

A. Well, you couldn't tell that unless you could open it up so you could see it.

Q. She has been on the mud now since last July, lying here on the flats?

A. I happened to see that boat before this collision; some time before. Oh, it might have been six months before—putting on a coat of copper paint on her and I noticed no crack at that time.
[227—160]

Q. But you couldn't tell when the crack was done after that so as to hold this collision responsible for it?

A. Well, judging from the shape the stern post was in, it would indicate that it was done then, be-

(Testimony of A. J. Inman.)

cause she is mortised, the stern post is mortised into it and the stern post at the present time is twisted and broken badly and that would be the occasion of the splitting of the keel.

Q. Where is the crack on the keel?

A. In the back end; up and down.

Q. Knowing the age of that hull, do you think it is worth twelve—well, your figure is \$1,328—to repair her?

A. It's worth that much to do the work.

Q. And would you spend that much money on a hull of that age?

A. I would spend four or five hundred dollars more and have a new one.

Q. And have a new boat?

A. Yes; if it was mine.

Mr. MARTIN.—That's all.

(Witness excused.) [228—161]

And thereupon the claimant, to maintain the issues on his part, introduced the following evidence, to wit:

Testimony of M. S. Dobbs, for Claimant.

M. S. DOBBS, called as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. You are the deputy collector of customs in charge, are you not? A. Yes, sir.

Q. At Ketchikan? A. Yes.

(Testimony of Carrington C. Keesling.)

Q. And as such, have, of course, the custody of the customs records and books? A. Yes, sir.

[232—165]

Testimony of Carrington C. Keesling, for Claimant.

CARRINGTON C. KEESLING, called as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. Mr. Keesling, state your full name.

A. Carrington C. Keesling.

Q. You live here in Ketchikan, Mr. Keesling?

A. Yes, sir.

Q. Lived here for some years?

A. I lived here for nearly two years.

Q. Where did you live before that?

A. Anacortes, Wash.

Q. What business are you engaged in?

A. I was engaged in the boat building business, and am still a boat builder.

Q. Still a boat builder? A. Yes.

Q. How long have you been engaged in business as a boat builder?

A. Since I was twenty-one years old.

Q. What, by the way, is your age now?

A. Fifty-six.

Q. During that time, have you maintained a plant of your own? A. Yes, sir. Not all the time.

Q. Sir? A. Part of the time.

(Testimony of Carrington C. Keesling.)

Q. Yes. Where have you worked. Where have you got your plant?

A. My plant was at Anacortes. Previous to that I was with the Pacific-American Fisheries several years.

Q. Where was that plant located? [234—167]

A. On an island near Bellingham.

Q. During that time, have you had occasion to build various styles and types of gas boats, cannery tenders and fish boats, etc.? A. I did, sir.

Q. Have you looked at the launch "Wildwood" down here on the beach? A. Yes, sir.

Q. Have you built boats of her type and design?

A. Yes, sir.

Q. And structure? A. Yes, sir; similar to her.

Q. At my request did you check the work over and examine the boat to see how much she could be repaired for?

A. I did, sir. I went over her in a casual way.

Q. Will you tell the Court, if you can, just the extent of those repairs, what you deem or found necessary to do to put her back in just as good condition as she was immediately before the collision, so far as that could be ascertained on an inspection?

A. Well, sir, I found there was several—in fact, I figured on removing most of the planking on the starboard side, up to about 14 feet long, and some of the deck, and put in a new stern post, and make an adjustment of the outer line. She's out

(Testimony of Carrington C. Keesling.)

of line a little; out of "wind" we call it—and new guard, new frames, new deck beams.

Q. How many new frames did you expect to use?

A. Well, I would have to give you, to be accurate about it, there's ten strakes, planking, 8 frames, 5 deck beams; rim or horseshoe, which is the timber that runs across the stern [235—168] and fastens the deck and planking together—

The COURT.—(Interrupting.) Just a little slower.

WITNESS.—(Continuing.) —decking, hundred feet of decking, stern posts, guards—ample guards to put her in shape—and iron bark, covering, and a few sundries, including hardware, and painting, pitching and puttying and all that.

Q. You have measured, then, the amount of feet, the amount of area, the amount of timber there, planks? A. Yes, sir; I have—858 feet.

Q. What would that cost you? A. Material?

Q. Yes.

A. About a hundred dollars a thousand. Material altogether I figure on \$145; labor, \$375.

Q. That would contemplate, now, how many men?

A. About four men, ten days.

Q. Four men, ten days.

A. Ample allowance for dockage.

Q. How much, Mr. Keesling, is your total estimate? A. \$500.

Q. \$500? A. Yes, sir.

Q. Did you— Of course, being a boat builder, of long experience, are you familiar with the struc-

(Testimony of Carrington C. Keesling.)

ture and design and style of hull construction, aren't you? A. Yes, sir.

Q. What would you say as to the method or style of construction employed in this boat?

A. Not first class. [236—169]

Q. Not first class? A. No, sir; amateur.

Q. Would that fact—would the latent defects or criticisms, if you could call it such, in her build or construction, would that have contributed, in your judgment, to the damage done by the collision?

Mr. COSGROVE.—Just a moment; what do you mean by “latent” defects?

Q. Well, I mean defects in the construction of the vessel itself.

A. Oh, she would be easier wrecked than she would otherwise, if she was put up in proper style; proper shape.

Q. Will you explain to the Court just what you mean by that; what you mean, first, if she had been put up in proper style and being put up in proper style, what the result would have been?

A. Well, if the proper style of boat, she would have been stronger, if she had deadwood in her for instance. There is no deadwood in her aft. The Sampson piece or timber which holds up the stern, lays on top of the stern post, lays on the—lays on top of the keel; and shaft log, there is no shaft log in her. The shaft, the part for the shaft is bolted through the stern post and this Sampson timber, which I have never seen before in my life, and I

(Testimony of Carrington C. Keesling.)

have seen a good many vessels, and being no dead-wood, nothing to bolt it to. [237—170]

Q. Would that style of construction, Mr. Keesling, have rendered her stronger?

A. Sure would.

Q. And more able to resist the kind of blow which she did receive?

A. Yes, sir. Her rim is very light, very light constructed rim, or horseshoe, which is commonly called rim.

Q. The "Wildwood" was struck where?

A. On the quarter, the port quarter; just about the stern post, I should judge, abreast of the stern post.

Q. Could you ascertain whether the keel was broken?

A. No, sir; I couldn't ascertain because she was more or less in the mud, and apparently the keel looked all right, although I see the necessity of a new shoe. Shoes, as a rule, are replenished in from one to two years. That's about all you can figure on a wooden shoe lasting under keels, from one to two years, and that was no fault of the accident.

Q. Is that estimate that you have given me based upon your knowledge of work and labor in Ketchikan in July, 1921? A. Yes, sir.

Q. It is? A. Yes, sir.

Q. You say \$500 would furnish everything?

A. Yes, sir; at the rate of \$7.50 a day.

Q. Are you familiar with prices, say, of second-

(Testimony of Carrington C. Keesling.)

hand fish boats of the type and age and general style of construction of the "Wildwood"?

A. Fairly familiar.

Q. What would you say the value of that boat was? A. Well, the value— [238—171]

Q. (Interrupting.) At the time of the collision; before the collision.

A. Previous to the collision?

Q. Yes, previous to the collision?

A. Well, I should judge the hull would be worth about \$300.

Q. How much? A. \$300.

Q. \$300? A. Yes.

Q. Of course, the engine, that would depend—

A. (Interrupting.) I don't know anything about the engine, because I never saw the engine; don't know the condition of her or anything about it.

Q. If the hull had been repaired immediately following the collision, do you think it would have been at all necessary to take the engine out of her?

A. Not unless the boat was submerged. If she was in the condition where she was submerged every tide, it would necessitate either taking the engine out or, if not, treating it with grease and oil, because there are parts that would rust.

Q. If you had gone to work right away to rebuild the boat, put her on the ways— By the way, did your figures contemplate the use of ways?

A. Yes, sir.

Q. Then if you would have hauled her on the

(Testimony of Carrington C. Keesling.)

ways, she wouldn't have been submerged, would she? A. No, sir.

Q. Then, in that event, there would have been no necessity of taking the engine out? A. No, sir.
[239—172]

Mr. MARTIN.—I think that's all. Oh, just one further question. Would you say that the vessel was worth repairing in her then present condition?

A. Well, according to what a man could use her for; what business he'd have for her. The boat, in my own estimation the boat is hardly worth repairing.

Q. That is based upon your knowledge of hulls of that age, that could be bought, in your judgment, say for \$300? A. Yes.

Q. It would not be worth more than \$300?

A. No.

Mr. MARTIN.—That is all.

Cross Examination by Mr. COSGROVE.

Q. Are you in the boat building business here, Mr. Keesling? A. I'm working at it; yes, sir.

Q. Where? A. For the Forestry Service.

Q. What doing? A. I'm repairing boats.

Q. How long have you been in town?

A. I have been in town since I arrived here in this town, I started to work here now over a year ago, work for the lighthouse people; lighthouse department.

Mr. MARTIN.—We'd like to offer his estimate in evidence as part of his explanation.

The COURT.—Yes.

(Testimony of Carrington C. Keesling.)

(Received and marked.)

Q. When did you examine the "Wildwood"?
[240—173]

A. Sunday morning just about nine o'clock, or a few minutes afterward.

Q. When were the arrangements made with you?

A. About eight o'clock Sunday morning.

Q. Who was it called on you? A. Mr. Selig.

Q. Have you known Mr. Selig long?

A. I have known him, known of him several years, and have met the gentleman sometime last year for the first time.

Q. I presume he told you why he wanted you to examine it?

A. No; he asked me if I could come down and look at the boat; examine the boat for them.

Q. Did he go with you?

A. Yes, he went with me because I didn't know where the boat was and didn't know there was such a boat as the "Wildwood" at the time.

Q. Did you ever see the "Wildwood" before the accident? A. No, sir.

Q. How long a time did you take in examining her?

A. I took, at that time I took about half an hour.

Q. That is the only examination you made?

A. Yes, sir.

Q. You noticed that it is drawn away from her stem? A. No, sir. [241—174]

Q. Just tell what examination you made of the boat?

(Testimony of Carrington C. Keesling.)

A. I made an examination of the damaged parts on the after end of the boat.

Q. Just to close up the hole in her?

A. Yes, sir; fix her up so that she would be seaworthy.

Q. Well, now, let's find out.

A. There was no pilot-house, no hatches taken into consideration whatsoever. I was told that the hatches had to come off since.

Q. I want to get at just what examination you made of this boat?

A. I examined the after end of the boat, the deck, planking, stern post, the after end of the keel, and the rim.

Q. Well, why didn't you examine the entire boat to see whether she had been damaged elsewhere, so that other repairs would be necessary?

A. I could see that.

Q. Was she drawn away from the stem at all.

A. I didn't examine her stem at all.

Q. Did you find out the condition of the planking in there or the other work?

A. That's taken into consideration; that would have to be made good.

Q. Then you bid covers tearing up the stem, because she is drawn away from it?

A. I don't understand you.

Q. Well, if she is drawn away from the stem, you would have to replace that part of it, too, wouldn't you? [242—175]

(Testimony of Carrington C. Keesling.)

A. If that was done in the accident, yes; if not, no.

Q. You say, if it was done in the accident?

A. Yes, sir.

Q. And if not, no.

A. The stem could be drawn away from the planking without otherwise, without being in that accident.

Q. Yes, that's very true.

A. We're not dealing with that phase of it.

Q. Do you figure that you are dealing with that phase of it, Mr. Keesling?

A. I'm dealing with the accident, as the accident shows on the boat.

Q. Oh, yes; then you didn't examine the stem at all, did you? A. No, sir.

Q. You don't know what the conditions or things prevailed in that? A. No.

Q. Did you examine the pilot-house?

A. Pilot-house?

Q. Yes. A. No, sir.

Q. Did you examine the keel?

A. I looked at the keel as I went about from stern to stern, examined the after end of the keel. I found nothing wrong with the keel.

Q. Could you tell whether the keel was cracked?
[243—176]

A. No, sir; I couldn't see, as I told you. The keel was in the mud.

Q. Well, you couldn't make much of an examination in half an hour, anyway, could you?

(Testimony of Carrington C. Keesling.)

A. It don't take me very long to examine a boat. 'Taint the first time I have examined one.

Q. What work were you going to do for \$500? Just tell the Court. A. I told you.

Q. Well, just tell us once more. You were going to repair that hull, now. Is that all?

A. Repair the hull and planking on each side, if necessary, and the frames and the deck, deck beams, and a rim, adjust the strong back where it belongs, put a new stern post in, caulk it and paint it, putty it and put it in commission.

Q. In other words, you were going to repair her stern? A. Yes, sir.

Q. Without reference to any condition that might prevail forward?

A. I went forward as far as the main hatch forward and examined her through there. There would have to be more or less work done to her hatch.

Q. Did you go forward to the pilot-house?

A. I went to the main hatch.

Q. But you didn't go on way up to the end of the boat?

A. No, sir; I didn't go up to the stem of the boat.

Q. Well, now, suppose you had to put in a new keel, how much would that add to the bid?

A. \$150. [244—177]

Q. Are you in business for yourself? A. No.

Q. You say you are not?

A. No, sir; I'm working by the day. Not in business.

(Testimony of Carrington C. Keesling.)

Q. Were you formerly in business for yourself?

A. Yes, sir.

Q. Where? A. Anacortes, Washington.

Q. And you made your bids then, I presume, along the lines that you are making your bid now?

A. I made my bids so that I could see my way right straight, fair and square. I didn't intend to rob anybody or get robbed myself.

Q. Is that the reason you are now working for wages instead of being in business for yourself?

A. I don't know that it was.

Q. Now you say her hull is worth about \$300?

A. Yes, sir; previous to the accident.

Q. At what time did you fix that value—when she was injured or new?

A. I valued her previous to the accident.

Q. Just tell me how you arrive at that price?

A. Well, I arrive at that price because second-hand hulls are pretty cheap, have been cheap for the last two or three years, since I have been in Alaska.

Q. Do you know a hull you could have bought on the 23d of July for \$300? [245—178]

A. I couldn't swear to that. I'm not in the buying business.

Q. Well, but you are putting a price on that hull when she was in the fishing business on the 23d of July, in the middle of the fishing season.

A. According to the condition of the hull and

(Testimony of Carrington C. Keesling.)

the construction of it, I wouldn't feel like giving over \$300 for the hull previous to the accident.

Q. Notwithstanding that you never saw her previous to the accident?

A. No; I didn't see her before that.

Q. Find any evidence of rot or decay, anything of that kind, in your examination?

A. No, no rot.

Q. And your criticism of the hull is what—it is too heavily built or too lightly built?

A. It is neither one nor the other.

Q. What is the chief objection, then?

A. It is an amateur built boat. It's not a well-built boat.

Q. Not built according to the rules you have followed in the game? A. Yes, sir.

Q. Do shipbuilders vary in their rules of building, or all follow the same rule.

A. They vary a good deal.

Q. Huh? A. Lots of variation.

Q. The builders don't agree?

A. They vary, but then it's the money that counts.

Q. What? [246—179]

A. It's the money that counts. If you want a good hull, you pay for it.

Q. Would you call this a good hull?

A. No, sir.

Q. In what respect does it fail to be good?

A. Because it is not properly constructed in a good many ways and it's a cheap hull.

(Testimony of Carrington C. Keesling.)

Q. Did you notice any natural crooks in her?

A. Natural crooks?

Q. Yes. A. Yes.

Q. Is that evidence of a poorly built or well-built boat?

A. That can be considered— I consider bent frames all right and I consider natural frames all right at times. I consider and the majority of boat builders consider, that bent oak frames are far superior to natural crook frames in a small boat.

Q. Now, this boat was strongly built, wasn't she?

A. I didn't consider her very strong, not according to my theory of building boats.

Q. Would you say that she is weak or strong?

A. She is very weak aft. I don't know what she's got in her forward. I didn't examine her there, but I know that aft she is very weak.

Q. What indication of weakness did you find?

A. The absence of deadwood and proper construction.

Q. Can you tell from her appearance now whether she had any deadwood in her before she was hit? A. I certainly can. [247—180]

Q. On or about the 23d of July do you know whether there were any fish boats for sale here, or hulls that could be used for fishing boats?

A. I couldn't say for sure, because on the 23d of July I was in the Government service, with the lighthouse people. I was very busy and I wasn't looking for hulls. I made no inquiries.

(Testimony of Carrington C. Keesling.)

Q. Yes, well, now, on the 23d of July—

A. (Interrupting.) In fact, I beg your pardon, I do know of two or three hulls that were for sale then.

Q. On the 23d of July, in the midst of a very successful fishing season, with the “Wildwood” in commission and actively engaged in the fish business, with no other boats available, would you say the price of her hull was not more than \$300?

A. Yes, sir; that is what I consider her worth—not over \$300. There were other boats available, too, at the time. I know of several boats. I know of one boat right close to the lighthouse dock. It was laying there, a boat about 45 feet long, that could be bought very cheap, laid on an old gridiron between the lighthouse and the old dock; could be bought very reasonable.

Q. Was that a well-known fact, or something within your knowledge particularly.

A. Well, it ought to be pretty well known. The boys of the lighthouse knew of it, and the man who worked at the old dock I know was trying to sell it.

Q. Did you know of the boat being advertised for sale?

A. No, sir; I don't know of its being advertised for sale. [248—181]

Q. What is the name of the boat?

A. I couldn't tell you the name of it. There is no name on it.

Q. Suitable for the fish business, was it?

(Testimony of Carrington C. Keesling.)

A. Yes, sir.

Q. What could it have been bought for?

A. I don't know that; I didn't ask him.

Q. So that you can't give us any more definite reason for putting a value of \$300 on the hull of the "Wildwood" under those conditions at that time?

A. Just my convictions on the prices of boats at that time. For the last two years boats have been very cheap. Everybody knows that—almost giving boats away here.

Q. Was that last year?

A. The last two years, almost giving boats away—almost pay you to take boats away to get rid of them. I've got one now that I've got \$2,000 tied up in. It's got a good engine, good accommodations, full equipment, and I'll take a thousand dollars.

Q. You didn't get one of those boats that they were trying to give away?

A. I didn't get it, because I had this boat.

Q. And you didn't want another boat?

A. No, sir.

Q. At the same price? A. No.

Mr. COSGROVE.—I think that's all.

Redirect Examination by Mr. MARTIN.

Q. Was there any evidence of any injury forward around the stem or forward part of the vessel? [249—182]

A. I didn't see any evidence of injury forward.

Q. If there had been any injury forward, you could have seen it from the inspection you made?

(Testimony of Carrington C. Keesling.)

A. I was forward there, but I didn't make a close examination of the stem, because I wasn't interested in the stem. I was trying to get at the actual damage at the stern, about from amidships aft.

Q. In your judgment how did the colliding ship enter the hull?

A. That is, enter the "Wildwood's" hull?

Q. Yes; that is, ranging forward or from forward to aft, straight ahead, or how?

A. I should judge, apparently, according to the way she appears that she hit her from forward. The two boats were approaching each other and the boat that caused the collision or struck the "Wildwood," hit with the stem leading aft.

Q. At about what angle did they come together, would you say? A. I should judge—

Q. (Interrupting.) That is square across?

A. Oh, no; about ninety degrees, I should judge.

Q. Ninety degrees. You mean ninety degrees from the line of her keel, of the "Wildwood's" keel?

A. Yes. That would be right square across, taken right square across. I don't know what effect it really had, but it was apparent as though she came in kind of quartering, not straight on, because of—

Q. (Interrupting.) Well, draw, for his Honor, just the angle that you think—

The COURT.—Oh, I understand. Not necessary to put in a diagram. [250—183]

A. Quartering is not straight on. It can be ninety degrees, less or more ten degrees.

(Testimony of Carrington C. Keesling.)

Recross-examination by Mr. COSGROVE.

Q. You say you didn't find any injury to the pilot-house?

A. No, I didn't examine the pilot-house because the hatch was off and the main hatch was off, off this deck, and they said that it was taken off after the accident.

Q. And you didn't examine the stem?

A. No, sir.

Q. And you didn't examine the keel?

A. I just saw the keel, as far as I could examine it. She was in the mud and there was nobody else that could go down there and examine the keel any better than I could, because she is submerged.

Q. And you just went down there to examine what it would cost to repair the damage done by the collision? A. Yes, sir.

Q. And they told you what that damage was?

A. They give me an idea of what the damage was. I could see it. I didn't have to be told.

Q. Mr. Selig told you, didn't he?

A. Mr. Selig told me to examine this boat and see what I could repair the damage for.

Q. The damage caused by the collision?

A. Yes, sir.

Q. That is what he told you? A. Yes, sir.

Q. And he told you what damage was caused by the collision, didn't he? [251—184]

A. He didn't tell me. I could see it.

Q. And that is why your examination was limited,

(Testimony of Carrington C. Keesling.)

Mr. Keesling, it was limited on account of his instructions?

A. Oh, no; not necessarily at all.

Q. You didn't make a thorough examination?

A. I went as far as there was any damage that was done.

Q. Do you mean to tell me that you can tell the damage done to the boat without examining the entire boat?

A. Sometimes; yes, you can; most assuredly.

Redirect Examination by Mr. MARTIN.

Q. This job would, in your judgment, have placed the "Wildwood" back in just as good condition as she was before the collision?

A. Yes, sir. I wouldn't put new pilot-house on her or new hatch covers, but the hull, as she is to-day, it would put her in shape to-day for that amount.

Q. When you leave the courtroom now and are excused, will you go down and examine the keel?

A. Yes, sir. [252—185]

Testimony of M. S. Dobbs, for Claimant (Recalled).

M. S. DOBBS, recalled as a witness on behalf of the claimant, having been previously sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. Tell us if you have not a statement there by Mr. Ryan and just what the record says concern-

(Testimony of M. S. Dobbs.)

ing his certificate as a master on the 14th day of February.

A. It reads as follows: I, L. F. Ryan, master of the vessel called the "Wildwood," 14 net tons. I swear that I am a citizen of the United States, having been born within the limits thereof, and that such vessel shall not, while my license continues in force, be employed in any manner whereby the revenues of the United States may be defrauded." Signed "L. F. Ryan, Master. Sworn to before me, this 14th day of February, 1921, George W. Woodruff, Deputy Collector."

Q. Have you a ruling on that in your department as to the requirement of citizenship, as to age?

A. They require a man to be 21 years of age. That's one thing. He must be a citizen of the United States, either born within the limits thereof or a naturalized citizen. [253—186]

A. Well, I know, but it is not in that. He swears that he is a citizen of the United States. [254—187]

Recross-examination by Mr. COSGROVE.

Q. Then this statement of Mr. Ryan, referred to, in your office, Mr. Dobbs, is to the effect that he is a citizen of the United States?

A. That he is a citizen of the United States.

Q. But it doesn't say whether he is an adult citizen or simply an infant citizen, minor citizen?

A. No, sir.

(Testimony of M. S. Dobbs.)

Q. And, of course, you don't know whether he was asked whether he was over twenty-one years old? A. I did not take that.

Redirect Examination by Mr. MARTIN.

Q. But, in the operation of your office, you require him to be an adult person, twenty-one years of age? A. Yes, sir. [255—188]

Q. Did you find that Mr. Ryan had any license when he appeared in command of the "Wildwood" on July 23d?

A. He wouldn't require a license to operate the "Wildwood," so he was not asked for one.

Q. Well, wouldn't he have go and take his master's certificate, that you spoke of?

A. He would not. He would simply be endorsed as master of the vessel, but he would not be required to have a license as a master of a fishing vessel.

Q. Oh, no; but when he was master in February and his name was endorsed on the vessel's papers, that continued until there was a change of masters sometime in March or April, and there were several changes, weren't there?

A. The fact that he was endorsed as master?

Q. Yes.

A. That would continue until someone else took his place.

Q. Was his name endorsed when he went as master the second time? A. Yes, it was.

Q. Do you find where the oath was administered to him?

(Testimony of M. S. Dobbs.)

A. I told you, if I remember rightly—and I believe I do—that where a man has taken the oath of citizenship once and where that is made a matter of record in your office, we don't require it the second time.

(Witness excused.) [256—189]

Testimony of Joseph F. Radenbaugh, for Claimant.

JOSEPH F. RADENBAUGH, called as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. Mr. Radenbaugh will you state your full name? A. Joseph F. Radenbaugh.

Q. You live here in Ketchikan?

A. I live across the channel from here.

Q. Across the channel? A. Yes, sir.

Q. How long have you lived here?

A. I have lived here since 1906.

Q. What business are you in?

A. Boat building business; boat building and repairing.

Q. How long have you been in the boat building and repairing business? A. Since 1895.

Q. And in what places, Mr. Radenbaugh?

A. Before I had a yard of my own, I worked in Ballard and Seattle for Morans, and I worked in Anacortes for several years, and I come up here in 1906, and I didn't go into the business here until about 1908. There wasn't anything in that line around here those years when I first came up here,

(Testimony of Joseph F. Radenbaugh.)

and I went into the business later and have been building scows, boats and drivers, and repairing boats.

Q. You have followed that business, then substantially all the time? A. Yes, sir.

Q. Since 1895?

A. Yes, sir; except about two years of my time.
[257—190]

Q. Are you familiar with the cost of labor and material in July, 1921? A. Yes, sir.

Q. Here in Ketchikan? A. Yes, sir.

Q. Did you at my request look over the boat "Wildwood"? A. Yes, sir.

Q. Down on the flats here? A. Yes, sir.

Q. Did you make an estimate of what it would take to repair the boat? A. Yes, sir.

Q. Well, what would it cost? A. Yes, sir.

Q. Can you tell his Honor, very briefly, just the amount of work which you estimated would be necessary to restore the hull, put the hull back in as good condition as she was before the injury?

A. What the price would be, what I would want to do the job?

Q. Well, before you come to your price, can you tell the Court just the amount of work?

The COURT.—What is necessary.

Q. What it would be necessary to do.

A. That there is an old boat, and you can't just really give all that down close like that there, because with an old boat you can't figure that way until you tear into her.

(Testimony of Joseph F. Radenbaugh.)

Q. What did you figure on?

A. I figured that I could do the work for \$700.

Q. And you would do the work within what period of time? [258—191]

A. Well, that would be according to how quickly they wanted it. If they wanted to have her in a hurry, I would put on several men and could get it out in eight or ten days, but if there wasn't any such hurry, I would do it mostly myself.

Q. How many men would you have taken to do that job in eight or ten days?

A. Three men besides myself.

Q. Three men and yourself? A. Yes, sir.

Q. Now, for that price of \$700, what did you estimate you were going to do, that is, how much decking, planking, new ribs, etc.

A. I would have to look that up (Takes piece of paper from pocket). I have twelve planking on the port side, and three on the starboard side, seven timbers, six deck beams, guards, 28 feet of bulwarking, 8x12 decking; fix the house, straightening up the pilot-house, putting that in shape and the stern post, and put in a new timber over the stern post there, overhauling and fixing it in sea-going shape.

Q. Would that, in your judgment, restore the vessel to about as good a condition as she was in before the injury?

A. It would last longer than the rest of the boat by a long ways.

Q. It would? A. Yes, sir.

Q. Have you, at my request looked over Mr. Kees-

(Testimony of Joseph F. Radenbaugh.)

ling's figures? A. No, I haven't seen his figures.

Q. Where did the collision occur on the hull? Where did they come together? [259—192]

A. On the port side, aft.

Q. Could you tell from the appearance of the timbers and the way the blow was given or directed to the hull, how it ranged, whether the oncoming and colliding vessel ranged from forward aft, or aft forward, or straight on? A. The vessel that hit her?

Q. Yes. The "Eagle" in this instance.

A. I don't just understand what you mean by that there part of it.

Q. Would the hull inside and the place where the timbers were crashed indicate it?

A. I could make you a diagram of it, give it to you that way.

Q. Well, will you do that?

A. From the way it looks to me (witness sketches diagram); about as near as I can figure it, it looks to me like she was hit—

Q. Which would be the "Eagle" and which would be the "Wildwood"?

A. This would be the "Eagle" and this (indicating) would be the "Wildwood."

Q. Well, put your name on the slip of paper so that you, so that it can be identified as your statement.

(Witness does so.)

Q. What would you say as to the construction of the "Wildwood," whether she was well built or poorly built?

(Testimony of Joseph F. Radenbaugh.)

A. Well, the "Wildwood" wasn't built by ship carpenters, I can see that. The "Wildwood" is a pretty strong built boat from where she got this blow forward, but from there aft, right where she got hit, she was weak. That was her weak spot. All boats have weak spots in them some place, and that was her weak spot. [260—193]

Q. Did she suffer more from the collision and the blow she received than she would otherwise, if she had been well built and strong, a strong vessel?

Q. If she had been strong in there, she wouldn't have torn loose anything like that there. It would just cut right into her.

Q. Are you familiar with the value of boats of the type of the "Wildwood" and were you familiar with the price in July, 1921?

A. Well, no; not very much. There are several boats around here for sale. You know how it is in this part of the country here. You can buy and sell lots of them a good deal cheaper one day than another. Just depends on how badly a man wants to sell a boat.

Q. Would you say that the "Wildwood" was worth repairing? A. No, sir.

Q. In your judgment? A. Not now.

Q. Why? A. Her age is the cause of that.

Q. Beg pardon? A. Her age.

Q. Her age?

A. Yes; if she had been a new boat, there wouldn't have been anything to it.

Q. She was built in 1906?

(Testimony of Joseph F. Radenbaugh.)

A. She was built in 1906. She was running around here in 1906, 1907, when I come up here.

Q. She lay under water, didn't she, for quite a period of time? A. Yes.

Q. Three or four years ago? [261—194]

A. Yes, sir. I don't know how long she was sunk, but I seen her under water.

Q. Can you make me an estimate of the value of the "Wildwood's" hull as you remember the hull in the summer of 1921, July 1921?

A. Well, you're asking me a question pretty hard to answer that way. They all value their hulls a great deal more than they can get for them. If I was going to buy a hull, I wouldn't buy nothing like that, at that age.

Q. I'll ask you if your best judgment is based upon your knowledge of boat values and the boat market, as far as you know about it?

A. Well, I'd lots rather sell the boat for \$600 or \$700 than to pay that for her.

Q. Your figure is \$700 to repair her in eight or ten days? A. Yes, sir.

Q. That is, three men and yourself?

A. Yes, sir.

Q. And you wouldn't feel that she was worth the cost of repairs? A. No, sir.

Q. Did you examine her keel to ascertain whether her keel was broken?

A. How is that?

Q. Did you find out whether her keel was broken?

A. I didn't find her keel broken.

(Testimony of Joseph F. Radenbaugh.)

Q. You didn't see that?

A. I didn't see no place where it was broken. There's a split [262—195] in the after-end, but that is natural for any of these old boats. When they put tension on those stern posts, they will split the keel.

Mr. MARTIN.—That's all.

Cross-examination by Mr. COSGROVE.

Q. Mr. Radenbaugh, could you tell from the examination you made of that boat whether she had been hit hard or simply approached gently?

A. Well, gently don't break into a boat.

Q. Would you say that, from your examination of the damage done her, that she was hit by a big boat traveling at full speed, or some lesser speed?

Mr. MARTIN.—That question, your Honor, is a little too indefinite.

A. It's pretty hard—

The COURT.—He can answer.

A. It looks to me like, if she had been hit full speed it would have cut her whole after end off.

Q. You don't think she was hit by a boat traveling at full speed, then?

A. I don't know about that. I don't know how slow they were traveling or how fast.

Q. Couldn't tell from the extent of the damage?

A. No; if it was one of those fast speed boats that travels along twenty miles an hour, that would have went on through her.

Q. Let me make the question a little more defi-

(Testimony of Joseph F. Radenbaugh.)

nite. You are familiar with the gas boat "Eagle"?
[263—196] A. I am.

Q. And you are also familiar with the damage done to the "Wildwood"? A. Yes, sir.

Q. By colliding with the "Eagle"?

A. Yes, sir.

Q. Would you say that the "Eagle" was traveling at full speed when she hit her?

A. No, I wouldn't say that. I am not sure of that, Charlie, because I couldn't hardly answer that question, because there is the guard to contend with and the deck, and it might have been—

The COURT.—Slanting blow, wasn't it?

A. Yes, sir; slanting blow. The way the damage shows there, it was a slanting blow. If it had been straight on like that there, there would be no "Wildwood" here.

Q. When did you examine the hull?

A. It was the day before yesterday. I was two days down there, two tides.

Q. Did you examine it thoroughly?

A. Yes, I think I went over her thoroughly. I went over her thoroughly enough to figure out what it would cost to put her in shape.

Q. Did you notice where she had pulled away from the stem? A. I didn't see that at all.

Q. Well, you examined her?

A. I never saw where she pulled away from the stem.

Q. Notice where she was twisted at all?

A. Twisted?

(Testimony of Joseph F. Radenbaugh.)

A. Yes. [264—197]

A. *Yes.* That was caused from laying on the beach, and also the blow, some of it.

Q. And you figure that you could fix her up so that she could go to sea, for \$700?

A. Well, I would fix her up for that money so that the man who owns her would be satisfied; yes, sir.

Q. Could you make her a safe vessel to go to sea for \$700? A. She is pretty aged.

Q. I say, could you make her safe to go to sea?

A. I'll make her as safe as she was.

Q. And you say you didn't find any evidence of her pulling away or straining forward of the hatch? A. Oh, there were strains.

Q. From the stem?

A. No, no; I didn't see anything there.

Q. How much time did you spend on her in your examination?

A. I was down there about three hours the first time and the second time—or the first time about two hours and the second time about three hours, crawling around on all-fours.

Q. You say you gave her a thorough examination; that is a pretty good examination?

A. Yes.

Q. And you didn't notice her being pulled away from the stem at all?

A. If she is pulled away from the stem, I couldn't find it. I didn't see that.

Mr. COSGROVE.—I think that is all.

(Testimony of Joseph F. Radenbaugh.)

Mr. MARTIN.—I think that is all, sir.

Q. Just one more question. Have you got the details upon which your bid of \$700 is based?

[265—198] A. Yes.

Q. You have.

A. Yes. That isn't all the stuff that's required in there, because you don't know what you need to fix her up—

The COURT.—Now, that isn't loud enough to get into the record. State what you told counsel.

A. I said that that isn't all that is required on an old boat like that. If it was a new boat or anything like it, I could tell. Taking down an old boat, I don't figure out what I want until I get down into her to know where I am at.

Q. You mean that there might be a lot of extras?

A. Oh, yes; you've got to take care of the things that you might need.

Q. Then this is not a complete bid?

A. That bid is a complete job; yes.

Q. You mean to say, then, that there might be a lot of extras?

A. You can't tell what kind of pieces you will need until you tear her down.

Q. Then that would constitute extra work for which you would charge extra?

A. No, no; that's in there. I have made allowance for all that.

Q. Well, then, as counsel doesn't seem to desire to present this as an exhibit, I would like to

(Testimony of Joseph F. Radenbaugh.)
introduce it in evidence as part of the cross-examination.

The COURT.—It may be received and marked. Also the diagram which Mr. Radenbaugh drew should be introduced in evidence.

Mr. MARTIN.—I will offer the diagram in evidence, if your Honor please. [266—199]

Redirect Examination by Mr. MARTIN.

Q. Mr. Radenbaugh, you made allowance in the \$700 estimate to put the boat back, to restore her, as near as you could estimate, and that estimate makes every allowance for all extras, etc.

A. Yes.

Q. That makes allowance for little odds and ends that you couldn't tell anything about until you got into her?

A. That's it, exactly.

Q. But you think that your figure of \$700 is ample in that respect? A. Yes, sir.

Q. Within your experience as a repairman?

A. Yes, sir.

Q. In fact— Do you do what might be termed heavy work; that is heavy repair work?

A. Yes, sir.

Q. Repairing scows? A. Yes, sir.

Q. And heavy craft of all kinds? A. Yes, sir.

Q. So that, in making repairs on an old vessel, you commonly run into a lot of things—

A. (Interposing.) that you don't expect.

Q. Don't expect? A. Yes, sir.

Q. And your estimate covers all that?

(Testimony of Joseph F. Radenbaugh.)

A. Yes, sir.

Recross-examination by Mr. COSGROVE.

Q. Just about how much of that bill have you allowed for [267—200] running into these things, do you know, or not?

A. Oh, I figured a hundred dollars would be plenty.

Q. Then your real bid is \$600?

A. No, no; that there covers everything. I always figure on something for myself.

Q. But you say that \$100 would take care of the unknown obstacles, and so if there wasn't any unknown obstacles, your bid would be \$600?

A. No, I'm figuring \$100 for profits.

Q. Oh, you're figuring on \$100 for profits?

A. Yes.

Redirect Examination by Mr. MARTIN.

Q. What are you allowing for the cost of your men? A. Dollar and a quarter.

Q. Dollar and a quarter an hour?

A. Yes, sir.

Q. That would be based on eight days' work for three men? A. Yes. And myself.

Q. And yourself? A. Yes, sir.

Recross-examination by Mr. COSGROVE.

Q. Would you, at your leisure, give me an itemized statement of the items that go to make up the \$700?

A. An itemized statement as to an old boat, I

(Testimony of Joseph F. Radenbaugh.)

told you that you couldn't very well figure that way.

Q. But your direct conclusion as to the \$700, I would like to have the items that make that up.

A. Yes; I can make an itemized statement of it.

Q. You must have it itemized in order to make it \$700. [268—201]

A. Certainly, when I was figuring it up I had all that.

Q. Give us the figures for each.

A. For each piece?

A. Yes.

A. Then, if you strike a lot of extras, you are up against it.

Q. Well, but then, you have made allowance for that, haven't you? A. Yes.

Q. Give us the allowances? A. All right

Q. The items and so forth, so that it can be—

A. (Interrupting.) Give me a piece of paper.

Q. Oh, at your leisure. Take the afternoon to do it, if you like. A. All right. [269—202]

Testimony of James Rasmussen, for Claimant.

JAMES RASMUSSEN, called as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. Mr. Rasmussen you live here in Ketchikan?

A. I do.

Q. Engaged in business here at Ketchikan, aren't you? A. Yes, sir.

(Testimony of James Rasmussen.)

Q. What is your business?

A. Well, gas engineer and working at odd times at boat repairing, too.

Q. Whom are you associated with?

A. Holman and I have been working together.

Q. Carl Holman? A. Yes, sir.

Q. What has been your experience in doing repair work?

A. Well, we have worked on, for the last year, any repair work that happens to come along.

Q. You have been working with him?

A. Yes, sir.

Q. Did you examine the "Wildwood" for me?

A. I did.

Q. And did you make an estimate of what you would have to do to restore the boat to as good a condition as she was immediately prior to the collision?

A. Yes, from what damage we could see, the way she was laying there, I estimated all the work that needed to be done on her.

Q. What were some of those items?

A. There was planking, there was decking, stern post, guards, [270—203] iron bark, nails and bolts, paint.

Q. What is your estimate of that work?

A. Close to \$650.

Q. \$650? A. Yes.

Q. Now, is that price, Mr. Rasmussen, based on your knowledge of the labor market, the lumber

(Testimony of James Rasmussen.)

market, material market, and the things you would need to put into the boat, in July, 1921.

A. Well, according to the lumber market, I got prices of lumber to-day, what it is at the present time.

Q. What did you allow for your lumber?

A. Ten cents a foot.

Q. That would be all clear, first-class fir lumber?

A. First-class boat lumber.

Q. Wouldn't you be able, in quantities, to get it for lots less than that?

A. According to a lumber dealer in town, he said he could land it here for that, maybe less.

Q. How long would that job take?

A. Well, we figure from a month and under.

Q. How many men?

A. Two of us—my partner and I.

Q. Your partner and you? A. Yes, sir.

Q. Can you come any nearer to that by telling us how much under if at all?

A. Well, you couldn't until you started to tear her apart, to see actually what had to be done for her. [271—204]

Q. Of course, if you used four men instead of two, you would get it done so much earlier?

A. We could get it done in less than that.

Q. So if you figure on two men on the job for one month, four men would perhaps do it in fifteen days? A. Somewheres around that.

The COURT.—Don't lead your witness there.

(Testimony of James Rasmussen.)

You're arguing with the witness and leading him, both.

Q. Would you be able to give us an estimate of the value of the hull the "Wildwood's" hull last July, before the collision?

A. Well, according to the age of the boat and the style of the boat, I think that a thousand dollars would cover the hull. I don't think you could sell it for any more than that.

Q. You mean now with the hull and engine, the whole business.

A. No; that is, \$1500 would cover the whole business complete.

Q. Is that so? Wouldn't she be worth—would the "Wildwood" be worth repairing, in your judgment, as you saw that boat?

A. Well, according to the way boats are now, you could repair the boat, but she'd be a boat and that's about all.

Q. You are familiar, of course, with boat construction, aren't you? A. Yes, sir.

Q. Is there anything in the "Wildwood's" construction that would have rendered the collision more serious than it would otherwise have been?

A. In my estimation, the stern was put in her in an awful flimsy shape.

Q. If the stern had been a well built stern, with all the proper construction, deadwood and all the work that a skilful boat builder would have put into the stern, would [272—205] the collision have been as serious, in your judgment?

(Testimony of James Rasmussen.)

A. Well, it probably wouldn't; probably wouldn't have done so much damage.

Q. The "Wildwood" was run into by a vessel approaching from the stern, ranging forward, or approaching from the "Wildwood's" bow, ranging aft?

A. You mean, would it make as much damage?

Q. No; I say from the appearance, now, of the timber, the planking and the injury itself, can you tell which way, which direction the colliding vessel came from?

A. Well, it looks to me like she was coming towards it; hit first and glanced aft?

Cross-examination by Mr. COSGROVE.

Q. You say you have been in the boat-building business how long?

A. Well, I have worked for Brown two winters and then Carl Holman and I got this shop last winter and ran it on our own hook.

Q. Did you make the examination alone, or was your partner with you?

A. I was alone when I made the examination and he went down afterward.

Q. Did you make a thorough examination?

A. As far as I could see, I made a thorough examination.

Q. Did you examine her stem?

A. No; I didn't examine the stem. I walked around the stem, but I couldn't see any damage.

Q. Did you examine the pilot-house?

A. Yes, sir. [273—206]

(Testimony of James Rasmussen.)

Q. Did you examine the keel?

A. No; there was water in the boat and she kind of rested in the mud.

Q. If she needed a new keel, did your figures take that in? A. No, it didn't take that in?

Q. Then as I understand you, your partner and you will take this job for \$650. A. Yes.

Q. Furnish the labor and material?

A. Furnish the labor and material.

Q. And you and your partner will work a whole month and furnish all the materials for \$650?

A. Yes; that's it; from what damage we could see.

Q. Would you take a bid to put her in first-class condition for that?

A. Yes, I believe I would—that is, if the keel—

Q. (Interrupting.) We don't want any if's about it.

A. Well, I couldn't examine the keel.

Q. Are you ready to take a bid to put that boat in first-class condition for \$650.

A. Yes, I believe I would.

Q. You are going to guess on the condition of the keel, are you?

A. The keel isn't going to cost a fortune to put in.

Q. How much would that cost extra?

A. I don't believe it would cost you over \$75 at the most.

Q. You want that added to the bill of \$650?

(Testimony of James Rasmussen.)

A. We're allowing for the bill of materials and our time.

Q. Are you allowing for any unknown troubles that you might run into?

A. We put in for enough material to cover the little extras. [274—207]

Q. And labor, too? A. Yes, sir.

Q. How much are you allowing?

A. Well, we allowed, I believe it was \$150 or \$200 for the extra material.

Q. Now, suppose that upon further examination, you found the stem, deck pulled away from her stem?

A. I was forward and I couldn't notice that.

Q. You didn't examine it very carefully?

A. I was up in the forecastle-head and I couldn't notice where anything was gone.

Q. Did you examine it carefully enough to be able to bid upon what you did see?

A. I believe I did.

Q. But you say you wouldn't repair her at all if she was yours?

A. Well, it is a type of boat that it looks like almost throwing money away on.

Q. And you say her stern is rather flimsily built?

A. It is.

Q. In what respect?

A. Well, there is no deadwood in her; she is bolted together in the stern there, and the ribs—two by fours, hacked out, and the way she is

(Testimony of James Rasmussen.)

fastened together; there is no proper fastening in her or clamps in her that I could notice.

Q. Do you think she was hit pretty hard or just gently?

A. Well, it looks like she was hit fairly hard; nothing extra.

Q. Could you give us your judgment as to how fast the "Eagle" was going when she hit her?

A. I don't think I could. [275—208]

Q. In fact, her stern is almost carried away?

A. Well, I believe part of the damage to that is done by laying on the beach.

Q. Oh, you are talking about the cause of the damage. I'm speaking now of the actual damage.

A. Well, she tore loose from the stern post.

Q. You don't know whether that was done by the collision or by her lying on the beach?

A. No, I don't.

Q. As a matter of fact her entire stern must be rebuilt, must it not?

A. Well, no; I don't think so.

Q. Would her pilot-house have to be replaced?

A. Possibly.

Q. Did you see any twist in her?

A. She is twisted now.

Q. Well, don't you consider that a pretty serious trouble in a boat when you come to repair it?

A. No; I don't think so.

Q. You could strengthen her up?

A. I could strengthen her up.

Q. And you are figuring on two men a month?

(Testimony of James Rasmussen.)

A. Two men a month.

Q. As she lies there now, her hull is worth about a thousand dollars?

A. No; I wouldn't estimate her hull was worth a thousand dollars now; not as she lies there.

Q. You put your figures at a thousand dollars?

A. I said the hull was probably worth a thousand dollars last summer, in July, I believe. [276—209]

Q. And then that will allow \$500 for the engine?

A. \$500 for the engine.

Q. Because you placed the total value at \$1,500 on the boat and the engine? A. Yes, sir.

Q. Are you familiar with the engine? A. No.

Q. You know the size of her?

A. I believe it's sixteen horsepower; I'm not sure.

Q. Suppose the engine is a 24-27 Standard?

A. Well, it depends on what condition it's in.

Q. In any event, it would be worth a whole lot more than \$500, an engine of that size?

A. No, I couldn't say it would be.

Q. But when you figured on the value of that boat just prior to the collision, you figured that a thousand dollars would be the value of the hull and \$500 for the engine?

A. Well, you can split it up any way you want to, but \$1,500 I believe is a fair market price for that boat at the time of the collision.

Q. That wouldn't take in tanks or any other equipment?

A. I am not figuring on tanks and the equip-

(Testimony of James Rasmussen.)

ment. I'm just saying that that would be a fair price for the boat as she stood in July.

Q. You mean unequipped?

A. I mean the way she was. She had her tanks, but there was no gear on them.

Q. But it would take in the engine?

A. It would take in the engine; the way the boat stood. [277—210]

Q. Notwithstanding the fact that you don't know what the engine was?

A. I hear it is a second-hand engine.

Mr. COSGROVE.—That's all.

Q. Oh, did you notice that on the starboard side the deck was broken all the way across?

A. Yes, sir.

Q. You have taken that into consideration?

A. I have taken that into consideration.

Redirect Examination by Mr. MARTIN.

Q. You made the estimate, I believe, to me, based upon clear fir, didn't you?

A. Clear fir; yes, sir.

Q. As a matter of fact, isn't a large portion of a vessel of spruce, or of this particular vessel?

A. The deck beams and some of the inside lumber looks like spruce to me. It's rough material. There is no finished lumber.

Q. Do you recall saying to me anything about spruce planking? A. No; I don't.

Q. Spruce material in her?

A. No; it is fir planking.

Q. Fir planking? A. Yes.

(Testimony of Alexander Brindle.)

Q. How about the guards and rails?

A. Well, the bulwarks they may be spruce.
[278—211]

**Testimony of Alexander Brindle, for Claimant
(Recalled).**

ALEXANDER BRINDLE, recalled as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. Your boat, when she was brought in, lay in the creek? A. Yes, sir .

Q. Didn't she? A. Yes, sir.

Q. Where is that?

A. It's right about a hundred and fifty yards, two hundred yards from where she is now.

Q. When she lay there, part of her was out over the land, wasn't she, at low tide?

A. She was practically above at low tide, practically bare.

Q. Practically bare?

A. Outside of the creek running.

Q. Do you remember in raising her up, how you did that, what the operation was?

A. Patched up the hull and floated her.

Q. How did you do that?

A. I patched the hull up as you see it and floated her.

Q. And you put a big chain around her?

A. Didn't put anything around her. We passed

(Testimony of Alexander Brindle.)

a line around her, but we didn't use it and took it off again.

Q. Didn't you have a large gas boat alongside to make this big chain fast, to raise it up?

A. No, sir.

Q. By such a mechanism or some such affair?

A. No, sir; we hooked on to the towing bits and towed her across, because she was floating—not floating; she was partially submerged. [279—212]

Q. You took a strain on her to raise her up first?

A. No, she was floating, you see.

Q. Huh?

A. She was floating then some. The fish was all out of her.

Q. Full of water, wasn't she?

A. Certainly she was full of water.

Q. Don't you think that raising that boat by wrapping a chain around her amidships, an old vessel of that sort, that that would have some effect on breaking the keel?

A. There was no chain wrapped around her amidships. She was never towed with anything wrapped around her, because the line we had around her we took to tow with. In the first place we put a rope around her.

Q. Wasn't raised up by you to make her fast alongside of the gas boat?

A. She wasn't towed alongside of the gas boat. She was towed astern.

Q. She was raised up first by the gas boat?

(Testimony of Alexander Brindle.)

A. She was towed, as I said.

Q. How much did you pay for the engine, if you recall what your figure is again?

A. You mean to say what I paid for the engine or what the engine cost you?

Q. What you paid for the engine?

A. I paid \$1,200 for the engine.

Q. When did you buy the engine, how long ago?

A. I think it was three years ago.

Q. And from whom?

A. From a man named Barron Atkinson.

[280—213]

Q. That was three years ago? A. Yes, sir.

Q. You paid how much for the hull?

A. I paid \$350 for the hull under water.

Cross-examination by Mr. COSGROVE.

Q. It cost you how much to float her?

A. It cost me nearly \$1,300 to put her in the water.

Q. So the hull cost you \$1,600?

A. No; I'm counting that. It cost in the neighborhood of \$1,300 to fix her up and float her.

[281—214]

Testimony of Al. Ames, for Claimant.

AL. AMES, called as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. Your name is Mr. Ames? A. Yes, sir.

(Testimony of Al. Ames.)

Q. Al Ames? A. Yes, sir.

Q. You have lived here in Ketchikan for some length of time, have you? A. Yes, sir.

Q. How long? A. I come here in 1913.

Q. Were you employed on the gas boat "Eagle" at the time she was in collision with the "Wildwood"? A. I was.

Q. What were you doing aboard of her?

A. I was deckhand.

Q. Mr. Steve Selig was the owner and master?

A. Yes, sir.

Q. What has been your experience as a boat man, gas boat man, before the night of the collision?

A. Oh, I worked on a few different boats.

Q. How long, approximately?

A. Oh, I guess probably three or four years, all put together.

Q. And you are familiar with the operating of gas boats generally? A. Yes, sir.

Q. Now, upon the night in question, do you remember when you left Prince Rupert, the time of day? [282—215]

A. Why, I think it was somewhere around three o'clock.

Q. And you came back light, didn't you?

A. Yes, sir.

Q. There was on board whom?

A. Mr. Selig, myself and a man by the name of Olander, I think it is, Olander, I believe.

Q. Olander? A. Yes.

(Testimony of Al. Ames.)

Q. What time, if you remember, did the collision occur?

A. Oh, about—I should think about ten thirty; somewhere along there; probably ten twenty.

Q. Who was at the wheel of the “Eagle” at the time of the collision? A. I was.

Q. Was anyone in the pilot-house with you?

A. Yes, sir.

Q. Who? A. Olander was with me.

Q. What was he doing in the pilot-house?

A. He was just around there; that was all; on lookout, I guess.

Q. Sir? A. He was on lookout.

Q. On lookout with you? A. Yes, sir.

Q. Where was Mr. Selig?

A. At the time of the collision?

Q. Yes.

A. He was down below in the engine-room.

Q. How long had Mr. Selig been below, if you remember? [283—216]

A. Oh, probably fifteen minutes.

Q. Do you remember what time the lights, your lights, were put on, if at all, that night before the collision?

A. Why, Mr. Selig turned on the lights shortly before he went down, possibly twenty minutes.

Q. That would be twenty minutes before the collision? A. Yes, sir.

Q. And you have what size lights?

A. 32-candle power.

Q. Sir? A. 32-volt lights.

(Testimony of Al. Ames.)

Q. Mast headlight? A. Yes, sir.

Q. And side-lights? A. Yes, sir.

Q. They are furnished by a dynamo or generator on board the "Eagle"? A. Yes, sir.

Q. How large a vessel is the "Eagle"?

A. Well, I don't know; I'm sure, about sixty feet, I should think.

Q. You don't remember her dimensions?

A. About sixty feet, I should think.

Q. She has a lighting plant and equipment, has she? A. Yes.

Q. You know the kind of lighting plant and equipment?

A. Why, storage batteries and a dynamo.

Q. When had you taken the wheel before the lights were flashed on?

A. Did I take the wheel before? [284—217]

Q. Yes.

A. Yes; just about that time, somewheres around that time.

Q. You had relieved the other man at the wheel, had you? A. Yes, sir.

Q. What time, with reference to the time you turned the lights on?

Mr. COSGROVE.—He didn't say he turned the lights on.

Q. Well, the lights were turned on?

A. Oh, possibly twenty minutes.

Q. Before the lights were turned on?

A. That I took the wheel.

Q. Yes.

(Testimony of Al. Ames.)

A. No; it was approximately the same time.

Q. You took the wheel about the same time that the lights were turned on? A. Yes.

Q. And you think that was about, that it would be about twenty minutes before the collision?

A. Somewheres around that neighborhood, as near as I can figure it out.

Q. Did you, in standing at the wheel, observe the "Wildwood" for any length of time before they came together? A. No, sir; I did not.

Q. How long would you say it was and how far away was the "Wildwood" when she came into collision? A. When I saw her?

Q. Yes, when you first sighted her?

A. Probably five or six—well, fifty or sixty feet.

Q. Fifty or sixty feet?

A. Yes, sir. [285—218]

Q. And did you observe whether she had any lights on at the time?

A. I thought she had one.

Q. What kind of light was that?

A. It was a dim light—not a bright light.

Q. White light? A. White light.

Q. Or a colored light? A. White light.

Q. Was it an electric light or another kind of light?

A. No, it wasn't an electric light.

Q. It was not an electric light? A. No.

Q. What kind was it, that you remember?

A. Well, I suppose an oil light, coal-oil.

(Testimony of Al. Ames.)

Q. An oil light? A. Something of that kind.

Q. Do you remember at this time about the condition of the lens or the glass of the light, this white light that you observed?

A. All I observed is that it was dim. It might have been smoked. That was all.

Q. How high is that, or was that mast from the deck, from the "Wildwood's" deck, if you remember? A. How high the light was?

Q. Yes, the "Wildwood's" light, now, above her deck?

A. I should judge about seven feet, seven or eight feet.

Q. Has the "Wildwood" more than one mast?

A. No; I don't think so.

Q. Which would be seven feet, then, above the "Wildwood's" deck, [286—219] to where this light was? A. Probably that.

Q. Could you tell in which direction the "Wildwood" was going when you saw the dim white light? A. No, sir.

Q. What did you do? Tell his Honor now, just what you did when you saw that light. What happened on board those boats?

A. I put the helm hard to port and tried to get out of the way and the man, Olander, with me, he reversed the engine with the pilot-house control.

Q. Now, in putting your wheel hard to port, it would cause you to roll your wheel which way on board your boat? A. To the right.

Q. To your right? A. Yes.

(Testimony of Al. Ames.)

Q. What effect did that have on your boat and the direction it was then pursuing?

A. It was turning to the right.

Q. Turning to the right? A. Yes.

Q. Do you know, in point of fact, now, how far you did turn before coming into collision?

A. No, I couldn't say how far.

Q. Could you fix, now, with any accuracy, the position of this light on your boat?

A. When I first saw it?

Q. Yes.

A. Why it was about two points off the star-board bow.

Q. Two points off the starboard bow? [287—220] A. Yes.

Q. Will you take and draw—take this piece of paper and draw a diagram of your boat, the “Eagle,” and then a diagram of the “Wildwood.”

(Witness draws diagram.)

A. About in that position (showing) I saw the light.

Q. That (indicating) diagram would be the “Eagle,” would it? A. Yes, sir.

Q. Mark that the “Eagle”?

A. Yes. (Witness does so.)

Q. And that little dot would be your light, would it? A. Yes, sir.

Q. And the boat would be heading in the direction of the arrow that I have marked on the paper?

A. Yes, sir.

(Testimony of Al. Ames.)

Q. That (indicating) little spot would be the approximate position? A. Yes, sir.

Mr. COSGROVE.—Just mark them A, B and C, or something like that.

Mr. MARTIN.—Well, I'll mark that W. That letter W is for the "Wildwood." A. Yes, sir.

Q. And your vessel then swung which way?

A. To the right.

Q. Swung to the right? A. Yes, sir.

Q. Will you describe a circle from the position of the "Eagle" over toward the dot?

A. Yes, sir. (Witness does so.) [288—221]

Q. Which way did the "Wildwood" swing, if you can tell?

A. She was swinging to the right, too, I believe.

Q. She was swinging to the right? A. Yes, sir.

Q. So that she would go to the right and you would go to the right? A. Yes, sir.

Q. Just by way of illustration for his Honor, take the line of your keel and the line immediately at right angles to it, your beam, where would two points of the compass be approximately?

A. Two points?

Q. Yes.

A. That would be 22 degrees and 30 minutes.

Q. 22 degrees and 30 minutes? A. Yes, sir.

Q. That would be perhaps half of the forty-five?

A. Yes, sir.

Q. And by way of illustration, there is the line of the keel there (indicating) and the beam is here

(Testimony of Al. Ames.)

(indicating); 45 degrees would be four points off of that? This would be halfway between, then, would it? A. Yes.

Q. Between the two points? A. Yes.

Q. You struck the "Wildwood" on the stern?

A. Yes, sir.

Q. On the port side? A. Yes, sir. [289—222]

Q. You had no time to spare to do anything from the time you first observed this light, except what you did do? A. No, sir, I didn't.

Q. Did you as soon as possible, or as quickly as you could, turn the vessel's wheel? A. Yes, sir.

Q. As you have described? A. I did.

Q. What did Olander do, according to your best recollection, in the wheel-house?

A. Why he reversed the machine, the engine.

Q. How long did it take him to do that?

A. Oh, it wouldn't be very long.

Q. Describe the method to his Honor of reversing the engine of the "Eagle"?

A. Why it is just a wheel; just turn it around and throw the clutch the other way.

The COURT.—I understand.

Q. Is that what is termed a pilot-house control?

A. Yes, sir; part of it.

Q. Operated, then, sir, from the pilot-house? [290—223] A. Yes, sir.

Q. What did Mr. Selig do, if you know, when the collision occurred?

A. Why he came up on deck, shortly after—well, I'll say immediately.

(Testimony of Al. Ames.)

Q. Sir? A. He came upon deck immediately.

Q. I see. State everything, now, that was done from the time of the collision on the deck, what you did and what they did, and what was said.

A. Why, as soon as we had hit, we backed up and took them aboard, and took the "Wildwood" into town, towed her into town.

Q. Can you recall the circumstances during the time you were making the boat fast and taking her in charge, as you say?

A. We put lines aboard her and made them fast to the tow bitts.

Q. Which way, if you recall, was the "Eagle" headed after you got your lines aboard the "Wildwood"?

A. I could not say exactly which way she was headed. After we got the lines aboard, we headed for Ketchikan, as soon as we got her made fast.

Q. With reference to Mary Island, how far were you off the island at the time of the collision?

A. Why, I should think about three-fourths of a mile. [291—224]

Q. What was the condition of the light on the water; that is, was it dark or light?

A. It was dark.

Q. In the course that you followed, can you tell me, and the course in which you were headed immediately before the collision, can you tell me the character of the light on the mainland shore, on your starboard and on Point Alva, I think you call it?

(Testimony of Al. Ames.)

A. Well, the mountains, I think there were at times shadows in the water, which makes it kind of dark.

Q. Had you been looking in the direction of the "Wildwood" or the direction from whence she came before the collision?

A. We did some of the time.

Q. Was there anything said by Mr. Brindle after he came on board, or by the "Wildwood's" captain, about liquor or anything of that sort?

A. Not to me; no, sir.

Q. Had there been any liquor on board?

A. No, sir.

Q. What was your condition, that of a sober man, or otherwise? A. Sober.

Q. You know whether Mr. Selig had indulged in the use of any liquor on that occasion?

A. I don't think so.

Q. Could you see any side-lights at all on the "Wildwood"? A. I did not.

Mr. MARTIN.—That's all, sir. [292—225]

Cross-examination by Mr. COSGROVE.

Q. This pilot-house control, how far was that from the wheel, Captain? A. Probably two feet.

Q. And you say Mr. Olander was with you at that time? A. Yes, sir.

Q. I understand you to say that you were about fifty feet away from the "Wildwood" when you saw her? A. About that, fifty or sixty feet.

Q. You saw only one light? A. One light.

(Testimony of Al. Ames.)

Q. That's all. You didn't see the boat; you just saw the light? A. I just saw the light.

Q. She was on your starboard bow?

A. Yes, sir.

Q. Under the rules of the road she had the right of way, didn't she? A. Yes, sir.

Q. What did Olander do when he sighted her? When you sighted her what did Olander do?

A. He started to reverse the engine.

Q. Didn't he grab that wheel? A. No.

Q. You remember distinctly? A. Yes, sir.

Q. You remember distinctly the way you threw that wheel? A. I do. [293—226]

Q. When you sighted this light, you didn't know at first whether it was a boat or not or which way she was traveling? A. No, sir.

Q. I thought you said a little while ago that you saw her turn to the starboard.

A. I did after we got a little closer.

Q. How much closer?

A. Oh, only a couple of seconds.

Q. You were only fifty feet away when you first saw her?

A. Somewheres around fifty, sixty feet.

Q. You were traveling ten miles an hour?

A. No.

Q. How fast were you traveling?

A. I don't know; about seven, I guess.

Q. Seven. And the "Wildwood" was traveling at about the same speed? A. I have no doubt.

Q. We'll assume she was traveling between five

(Testimony of Al. Ames.)

and six miles an hour and you were only fifty feet away, and you didn't see which way she was going, when you first saw this light and a couple of seconds after that you saw her turn to starboard?

A. That is about the time we hit.

Q. That is what turned her, wasn't it? [294—227] A. No.

Q. The fact that you hit her? A. No, sir.

Q. Captain, did any appreciable amount of time elapse between the time you saw her and the time you struck her?

A. Well, I should judge about five or six seconds, something like that.

Q. Yes. Did you turn on the lights on your boat that night? A. I did not.

Q. Were they turned on? A. Yes.

Q. How do you know they were turned on?

A. Because Mr. Selig said he was going to turn them on.

Q. I see. But you testified that they were turned on? A. Well, he said that—

Q. (Interrupting.) You don't know anything about it then?

A. He said that and reached up and grabbed the switch.

Q. What? While he was with you?

A. While he was in the pilot-house.

Q. You know which switch he turned?

A. I didn't look, but I suppose it was the right one.

(Testimony of Al. Ames.)

Q. It's all supposition with you about the lights being turned on? A. No, sir; it is not.

Q. All you know about it is what somebody else told you? A. No, sir. [295—228]

Q. What else do you know about it then? How do you know? You don't know of your own knowledge whether the lights were ever turned on that night, do you?

A. Well, if a man says he turned on the lights, I suppose he did.

Q. You believe everything that anybody tells you? A. Not everything.

Q. But you believe what Selig tells you?

A. Well, in that case I would.

Q. You mean, in this particular case you believe him? A. Yes, sir.

Q. But you didn't go out to see whether the lights were turned on and you didn't turn them on yourself? A. No, sir.

Q. The only way you knew that they were turned on is that Selig said he was going to turn them on?

A. He reached up and got hold of the switch. I suppose he turned them on.

Q. And you also suppose he got hold of the right switch, don't you? A. Yes.

Q. And that's all you know about it, isn't it?

A. No.

Q. Oh, now, be fair. That's all you know about it? A. Why certainly that's all I know.

Q. That was about how long before the collision?

A. Oh, possibly twenty minutes.

(Testimony of Al. Ames.)

Q. At the time you went on the ship that night you took your watch at the wheel? [296—229]

A. About that time.

Q. Did Olander go into the pilot-house with you at the time you went in to take the wheel?

Q. (Interrupting.) Or did he remain there after you took the wheel?

A. He remained there after I took the wheel.

Q. Remained there all the time? A. Yes, sir.

Q. You say you looked out once in a while to see what was going on outside, to see if there was any boat in sight? A. Yes.

Q. I think the statement you made to your counsel is that you looked out some of the time. Is that true?

A. I would have to look at the compass once in a while.

Q. Looked at the compass once in a while and looked out of the window once in a while?

A. Yes.

Q. I presume you and Olander are pretty good friends, aren't you?

A. Well, I don't know. I never knew him until this matter.

Q. But naturally you and he were visiting there. You were talking over current events, what happened at Rupert, things of that kind?

A. No, I don't think so.

Q. You remember, don't you, or do you remember what happened that night? [297—229]

(Testimony of Al. Ames.)

A. I don't remember whether we was talking at the time or not?

Q. But during the evening, after you took the wheel, during the twenty minutes that you were there before this collision, don't you remember your talking or not?

A. Oh, I suppose we probably did talk some.

Q. And occasionally you looked out of the window? A. Not occasionally; quite often.

Q. And the night was dark? A. Yes.

Q. And very hazy wasn't it? A. Yes.

Q. In fact, it was so thick you couldn't really see very far ahead?

A. Oh, no; it wasn't so very hazy.

Q. What was your last answer?

A. It wasn't too hazy.

Q. But you couldn't see very far ahead of your boat? A. Not at that time.

Q. No moon shining?

A. I don't think so; I don't know.

Q. You didn't notice a moon? You didn't notice a moon shining?

A. I didn't notice if the moon was shining.

Q. And you remember quite distinctly that there was no liquor aboard? A. Yes, sir. [298—230]

Q. And you hadn't been drinking at Rupert prior to starting out? A. No, sir.

Q. And you only noticed one dim light on the "Wildwood," and two seconds later you hit her. You turned to the starboard and the "Wildwood"

(Testimony of Al. Ames.)

turned to the starboard, and that would throw your wheel hard to port. A. Yes, sir.

Q. And you were fifty feet away, traveling at eight miles an hour, approximately, and you couldn't tell, when you first saw her, which direction she was going in, but later you noticed her turn to starboard. That is what you are testifying to?

A. I noticed which way she was going when we hit her.

Q. But you didn't notice when you first saw her?

A. No, I did not.

Q. But you hit her five seconds later?

A. About that, yes.

Q. And how soon after you saw her did you notice which way she was turning?

A. That was about the time we hit her.

Q. Oh; that was about the time you hit her?

A. Yes.

Q. That is the time you reversed your engine?

A. No; I didn't have anything to do with that. Olander done that.

Q. Well, but on your instructions, didn't he?

A. Yes. [299—231]

Q. He waited until you told him to reverse the engine?

A. Well, he was right there and he reversed the engine.

Q. That is, after you told him to do so?

A. Yes, sir.

Q. That was about the time you hit her?

(Testimony of Al. Ames.)

A. Yes, sir.

Q. You remember talking with Mr. Brindle, young Mr. Brindle, on board at all?

A. I don't know. I just spoke to him and that was all.

Q. You remember being around the after end of the boat where the towing bitts are when you got warned away from them on account of your dangerous position? A. No, I don't.

Q. You don't remember being back there?

A. I don't remember being warned away from there. I was back there.

Q. You remember if Mr. Ryan was there with Mr. Brindle?

A. I suppose he was there. I couldn't say that I know exactly where he was, but he was on board, I know.

Q. Hadn't you had any liquor to drink at all while in Rupert? A. No, sir.

Q. And you knew they had none on board the boat? A. No, sir; not that I know of.

Q. Was it particularly dark at that time due to shadows cast by the mountains? [300—232]

A. It was dark.

Q. Where did that darkness come from? Where did the shadows emanate from, could you tell? Could you tell us now?

A. I couldn't say that I could tell.

Q. How wide is the channel there?

A. Oh, I guess it is about six miles, I should say.

Q. Where would the shadows come from?

(Testimony of Al. Ames.)

A. From the land.

Q. Land ahead of you or behind you?

A. Both ways. I mean to the starboard side and to the head of us.

Q. And the mountains come down close to the water there, don't they? A. Yes, sir.

Q. On both sides?

A. No; they don't come down on both sides.

Q. Which side do they come down on?

A. The starboard side and ahead.

Q. Well, now, with reference to Mary Island and the other shore?

A. Mary Island hasn't got no high mountains.

Q. Oh, it hasn't? A. No.

Q. All the high mountains are on the other side?

A. Yes.

Q. They come down close to the water?

A. Yes, sir.

Mr. COSGROVE.—That's all. [301—233]

Cross-examination by Mr. MARTIN.

Q. Did you mean to be understood as saying that you reversed your engine after you struck the "Wildwood" or before? A. Well, no; before.

Q. Mr. Cosgrove asked you a question of this sort and I thought you said you reversed the engine after you struck the "Wildwood."

A. Well, I didn't understand it that way.

Q. You didn't mean so to testify? A. No.

Q. What is the fact as to how soon you reversed the engine after you saw the light fifty or sixty feet away? A. How is that?

(Testimony of Al. Ames.)

Q. What is the fact, now, as to how soon you reversed it after you saw this light?

A. Well, it was done immediately, in two or three seconds, I guess.

Q. Did you go ashore at all in Prince Rupert?

A. I was ashore up in the cold storage.

Recross-examination by Mr. COSGROVE.

Q. Captain, you are sure you were fifty feet away when you first saw this light and you reversed your engine two or three seconds later?

A. Yes, sir.

Q. Now, with a boat traveling at eight miles an hour and another boat traveling in the opposite direction, fifty feet away, they would meet in just two seconds, so that you did hit her before you reversed the engine?

A. No; I don't think so. She was going full speed, when she hit, astern. [302—234]

Q. But you didn't reverse the engine yourself?

A. No.

Q. You told Joe to do so? A. Yes, sir.

Q. And it wasn't done immediately when you saw the light because you didn't know which direction she was traveling in, did you?

A. I didn't know. I couldn't tell which.

Q. It was a second, or two or three— I think you said four or five seconds after you saw this light that you found out she was going to the starboard. Then you turned your boat to the starboard? A. Yes.

(Testimony of Al. Ames.)

Q. All right. Did you tell Joe to reverse the engine before or after you turned your boat to the starboard. A. Well, it was after.

Q. After you turned your boat to starboard?

A. I was doing it at the time.

Q. Then some appreciable length of time must have elapsed from the time that you saw that white light and turned your boat to starboard until you told Joe to reverse the engine. How much time would you think that would be?

A. I couldn't say.

Q. Well, two or three seconds anyway?

A. I wouldn't say; I couldn't say.

Q. Give us your best guess. A. No— [303—
235]

Q. You saw that light and you hit her just that quick? A. No; it was just a short time.

Q. Give us your idea, from the time you saw the light. A. From the time I saw the lights?

Q. Yes; until you hit?

A. About five or six seconds.

Q. After you saw her, how long before you found out which direction she was traveling in, whether she was going to starboard or port?

A. Oh, I couldn't say as to that, either.

Q. Well, it would be about that, two or three seconds, then? A. It probably would.

Q. That leaves a couple more out of the five you mentioned. Then you turned your boat to starboard? A. Yes, sir.

(Testimony of Al. Ames.)

Q. Then you told Joe to reverse the engine, didn't you? A. Yes, sir.

Mr. COSGROVE.—That's all.

Redirect Examination by Mr. MARTIN.

Q. You mean to fix the time from the time you first saw this light until you told him to reverse the engine as being three out of those five seconds?

A. Oh, I don't say it exactly that way. I don't say that, but it is pretty hard to have a person tell exactly what the time was.

Q. Within what distance from the "Wildwood" would she begin to take the wheel when you throw her hard over? A. The "Wildwood"?

Q. I mean in what distance will she begin to take the wheel when you throw her hard over—the "Eagle"? [304—236]

A. Oh, I suppose she starts immediately after she is thrown hard over. [305—237]

Testimony of Patrick Hamilton, for Claimant.

PATRICK HAMILTON, called as a witness on behalf of the claimant, having been first duly sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. Mr. Hamilton, you live in Ketchikan?

A. I do.

Q. And you have been a mariner for some years, have you not? A. Yes, sir.

Q. And have had more or less to do with gasoline

(Testimony of Patrick Hamilton.)

boats, cannery boats, fishing boats, up and down the waters of Ketchikan. A. Yes, sir.

Q. Would you be familiar with, or do you know the gas boat "Wildwood"?

A. I certainly do.

Q. Did you know that boat before she was in collision with the "Eagle" last July, July 23d?

A. I heard of it.

Q. Did you know the boat before that time?

A. Certainly; I knew her since she was launched.

Q. Were you at that time likewise familiar with boats of the same general type, character and description as the "Wildwood"?

A. Well, so far as appearances went, I do.

Q. The "Wildwood," I believe, was built in 1906. Now, would you be able to give us an estimate as to the value of the "Wildwood" before the collision?

A. No, sir; I could not; not if I was going to buy it, I couldn't. I would have to see her, examine her, take her out of water. I might figure then what I could give for the boat. [306—238]

Q. Could you give an estimate generally of the value of vessels of that type and class and that age from other sales and other boats that have been bought and sold and traded.

A. I don't think I could give an answer that way to satisfy anyone, because a boat might not be worth what a man will pay for it when he wants the boat very badly.

(Testimony of Patrick Hamilton.)

Q. You don't think, at this time, that you could give me an estimate as to the "Wildwood's" value?

A. Beg pardon?

Q. You don't think at this time you can give us any estimate as to the "Wildwood's" value before the collision? A. Before the collision?

A. No, I don't know what shape she was in. I don't know how she was fitted up or anything about it. I was never aboard of her at any time in my life.

Q. You have looked at the "Wildwood" recently, have you not?

A. I don't know anything about it. I know when she was building, I understood they were putting very heavy timbers in her, building her very strong for to put steam in her.

Q. Have you had occasion to look at the "Wildwood" at all recently?

A. I went down about four or five days ago and had a look at her.

Q. Would you be able to tell from her then present condition, what her value was before the collision? A. No.

Q. You could not? A. I could not. [307—239]

Q. Could you see enough of the vessel, the part that was not damaged, to furnish any estimate at all?

A. I don't see how I could. I didn't go inside the vessel. I seen the outside of her, that was turned up; I did look at her the way she was laying there on beam ends. [308—240]

Testimony of Steve Selig, in His Own Behalf.

STEVE SELIG, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. Mr. Selig, you are the claimant and respondent in this suit? A. Yes, sir.

Q. Now on trial? A. Yes, sir.

Q. And owner of the gas boat "Eagle"?

A. Yes.

Q. Can you tell the Court just the description of the "Eagle," her size, tonnage, when she was built, her value? Give us those details so we may know something about the boat. That is, as far as you can.

A. She was built in 1919 in Tacoma. She was 63 feet long; 14 ft. 7 in. beam, 6 ft. deep, gross tonnage 34, net 27, equipped with a Standard gas engine, 40-horsepower. That's about all I can say about the boat.

Q. Tell us about your engine. What kind of an engine have you? A. Standard gas engine.

Q. What kind of electrical equipment have you on your boat?

A. We have a storage battery system and a dynamo that runs from the main engine—a 32-volt system.

Q. The dynamo is connected by a drive or belt to the main engine?

(Testimony of Steve Selig.)

A. By a belt from the flywheel on the main engine to a pulley on the dynamo. [309—241]

Q. And the dynamo, of course, generates electrical current? A. Yes, sir.

Q. And furnishes your lighting system?

A. Yes, sir.

Q. You have, in addition to that, a storage battery system as well? A. Yes, sir.

Q. What are those batteries?

A. They are 17 cells of Delco lighting system, supposed to be one of the best on the market.

Q. What lights does your vessel carry?

A. She carries a green light on her starboard side and a red light on her port side; two lights and a mast headlight.

Q. How high is your mast headlight above the deck, would you say?

A. The mast headlight is about 16 feet.

Q. That mast headlight, what candle-power is that—do you know?

A. That is six fifteen—15 watts, I think it is, and 6 candle-power. That is, for the side-lights.

Q. The side-light.

A. Anything more than that would be too bright.

Q. Now, the mast headlight? A. The same.

Q. You say her depth was six feet? A. Yes.

Q. You mean by that the draft of the vessel; the vessel's draft in the water, or the standing room inside, headroom?

A. Well, the hold is six feet.

Q. Six feet in the hold? [310—242] A. Yes.

(Testimony of Steve Selig.)

Q. Where is the engine located in the vessel?

A. In the forward part of her. In the living quarters.

Q. Then there is a pilot-house, is there?

A. The pilot-house is right over the engine.

Q. Right over the engine?

A. Yes, right over the engine.

Q. Does that lead into it, the pilot-house, lead into it or made to step into the pilot-house from the main deck?

A. You can go in from the main deck into the pilot-house, but you can't go from the engine-room into the pilot-house.

Q. Sir?

A. You can't come from the engine to the pilot-house, but you can come from the engine-room out on the deck. That's the only way up and down.

Q. I will ask you whether, in addition to the pilot-house, she has any other house above deck?

A. Only the pilot-house. There is a break that is built along forward to make the living accommodations, and the pilot-house is on top of that.

Q. How long is the pilot-house?

A. Not very large pilot-house, probably about ten feet in length and about eight feet wide.

Q. The living quarters you say are below that?

A. All below.

Q. All below the main deck?

A. Below the main deck.

Q. Are there any lights or port-holes? [311—
243]

(Testimony of Steve Selig.)

A. She has five port holes on each side about as big as this plate (pointing to tray on Judge's desk) here.

Q. As large around as that plate?

A. Pretty much. It may be an inch smaller than that. She has lights over all her beam, from one end of that cabin to the other end and her forecastle is pretty much from that break to that (showing). There's eight berths.

Q. Several lights on each side?

A. Five port-holes on the side.

Q. What lights have you in the cabin?

A. That's what were speaking about now. I have several of them 32 candle-power lights just overhead like these lights are (referring to lights in courtroom).

Q. You have seven? A. Several.

Q. Seven? A. Or more.

Q. What is the effect when those lights are lighted with respect to the port-holes, as to the lights being observed in your vessel?

A. Well, you could easily see through the port-holes because she has five of them, and those lights would shine out the same as through those windows (pointing). [312—244]

Q. Have you a range-light? A. Yes, sir.

Q. That's aft, is it, or forward?

A. That's on the same mast as your headlight is on; it's on the top of the mast.

Q. What course did you make on the night in

(Testimony of Steve Selig.)

question from Prince Rupert up to Mary Island, at the point of collision?

A. I was steering northwest by west, half west. That's a course that takes me one mile off Tree Point and one mile off Mary Island.

Q. Off Mary Island light?

A. Yes; in fog or dark.

Q. Have you measured that course to know whether those distances are accurate?

A. Yes, I have measured them and run them hundreds and thousands of times.

Q. What time did you leave Prince Rupert on the night in question? A. Three-ten.

Q. What time did the collision occur?

A. Ten-twenty when we first landed on her.
[313—245]

Q. What had you been doing immediately before the collision?

A. Fifteen minutes before the collision, I was sitting in the pilot-house reading a Prince Rupert paper.

Q. Light on in your pilot-house?

A. I had lights to read by; sure.

Q. Who was in the pilot-house with you?

A. My two men.

Q. What are their names?

A. Joe Olander and Al Ames.

Q. How long did you remain in the pilot-house?

A. I remained in the pilot-house, to the best of my judgment, until about ten minutes before this

(Testimony of Steve Selig.)

happened. I was in the pilot-house ten or fifteen minutes at the most.

Q. Respecting your lights before the collision, did you know whether they were on or off?

A. I put them on myself.

Q. How long before the collision?

A. I put them on to read by, switched them on myself fifteen minutes before I went below down into the engine-room.

Q. Respecting now the condition of your engine-room or the condition of the light down below?

A. Well, your button works down below different than the pilot-house. The pilot-house button switches on the mast headlight right in the pilot-house. Down below you have different switches for your engine-room lights.

Q. Did you have your engine-room lights lighted before the collision?

A. Everything was on full blast.

Q. How long before? [314—246]

A. Fifteen minutes.

Q. Was there any liquor used on board that vessel?

A. Not that I seen that evening. I was the only man that was ashore in Prince Rupert.

Q. What, if anything, was said or spoken about liquor?

A. Well, Mr. Brindle, when he come aboard there, he was kind of little excited, you know; naturally would be, you know, in a case like that, and he jumped around and said, "What's the matter?"

(Testimony of Steve Selig.)

You fellows all drunk?" I said, "Yes, I guess so," and he said, "It looks like Al has got liquor." I said, "Probably he has. I don't know anything about it. He wasn't uptown." That's about all that was said.

Q. Was there any liquor there on board that you know of? A. Not that I seen, sir.

Q. Would you have known it?

A. Well, Mr. Ames is a hard man to study out. I have had him two or three months at a time and I don't think he spoke two or three words to me.

Q. What is his demeanor or manner as to talking to anybody?

A. I don't know what it is, I'm sure. He don't speak very much.

Q. Did you observe anything unusual in his appearance that night that was in anywise different from his usual demeanor?

A. No, I did not. I was in the pilot-house from Tree Point until I was off Black Rock and that would have taken approximately 35 minutes to make Mary Island light, and I was with those two boys there reading the paper. When it got dark enough I read a little bit and then went down below. I left them about 15 minutes before it happened.
[315—247]

Q. Tell us, if you recall, what the condition of the sky and sea was that night.

A. There was a beautiful night out on the water—fine. I sat up and watched fish all the way from Cape Fox in.

(Testimony of Steve Selig.)

Q. Would you say that it was clear and dark, or light and dark?

A. When we got up to Black Rock it got dark and calm, shady on the water.

Q. Tell his Honor what effect that calm, dark shadow has on the water. In other words, what was the condition of those waters that you were heading into?

A. Heading into any heavy land, any mountains, it is dark. Any sea-faring man knows that. We all know that.

Q. Does it make it light or increase the darkness if the sea is calm?

A. Well, a calm on a night like that is the worst you have to contend with. On any other night a ripple on the water shows light. With calm water it is just the same as traveling in the woods.

Q. Do you recall where the moon was that night?

A. Yes.

Q. Whether there was any moonlight to speak of?

A. Yes, there was a moon. That's the way the moon was when the accident happened, over a peak, over a mountain, that way (indicating).

Q. Just illustrate that.

A. That's a mountain there (indicating); that's the heavy mountains on the Quadra side, the mainland shore. The moon was there (pointing); very cloudy over it. You could only see it once in a while. Just up about ten or fifteen minutes over the mountains. [316—248]

(Testimony of Steve Selig.)

Q. Did you, or did you not, see the "Wildwood" at any time before the collision, before the two vessels came together? A. I did not.

Q. Did you see her immediately after the collision? A. I did.

Q. Did you have occasion to examine the light?

A. The only light I seen was an oil lamp in front of the mast, stuck very low so that you could stand up, reach out and put it in. One oil lamp burning; that's all I seen on her.

Q. Did you examine the "Wildwood" to see whether her side-lights were burning?

A. There were no side-lights burning.

Q. Did you observe anything peculiar or unusual in the glass or surface of the glass of this mast headlight that you did observe?

A. Oh, it wasn't any of the brightest kind of light for an oil lamp. They ain't like an electric light. They wouldn't show up very bright with the vibration, hanging on to the mast, they would bob up and down a little bit.

Q. What was done immediately following the collision?

A. Well, there was a line put on. Mr. Brindle brought a line aboard when he left her and made it fast to the bitts, and she was sinking all the time, going down; so he come aboard with his grip and some of the things he had, I guess, and I started the machine myself, took charge myself of the boat and we started to steer right in under the Mary Island lighthouse.

(Testimony of Steve Selig.)

Q. What was your purpose in doing that?

A. Well, the boat was sinking and she only had one line on her, and in swaying back and forth, I was afraid she would [317—249] break the line and go down in deep water. A chain would stand the pressure, and I wanted to get in close to the shore so we could fix her up better and save the boat and save her cargo. That was my intention. I went as close to the beach as I could, and we got two more lines on her.

Q. How far off Mary Island light were you when the two vessels came together? That is, when you went up on deck?

A. My judgment would be one mile.

Q. Would that be north or south, or what direction would it be?

A. Well, it would be about three points to the southern of the lighthouse.

Q. Well, point out to his Honor on the chart the place in which you were?

A. (Examines chart.) Well, they have got it pretty much marked out here. Where that X is, right there (pointing).

Q. Where the X is.

A. Yes, about three points, looking down a little towards Tree Point, you know.

Q. You then headed up in to the lighthouse?

A. Yes, we went right in under the lighthouse, as close as I dared to go.

Q. Did you hear the statement by the lighthouse-

(Testimony of Steve Selig.)

keeper as to the conversations out on your boat occurring on board the vessel? A. Yes.

Q. What is your explanation as to that?

A. Well, my explanation is this: They couldn't hear anything from where this happened, but from where I was, we could talk back and forth from where I stopped my engine. We put two more lines on the boat where I slowed my engine up, [318—250] because I had to keep to shore as close as I dared so that if she would sink, we could get her back. My intention was to land her in this cove right there (pointing), beach her there.

Q. That would be on the flat there?

A. There was a good flat and I thought if we could get her as far as that, we'd be doing mighty well; and I looked things over and we finally decided to come to Ketchikan, so we proceeded on. We got in at five o'clock in the morning, around five o'clock with the boat.

EVENING SESSION—Jan. 20, 1922.

STEVE SELIG on witness-stand.

Direct Examination (Resumed).

Q. When did you go to sea?

A. It's a lifetime experience on the water.

Q. Tell the Court very briefly just what class of vessels you went to sea in first, how long you followed it and where, and how long out here?

A. Well, I think quite a long while. Of course, I never done anything else, except go to sea on the

(Testimony of Steve Selig.)

Atlantic Coast and the Gulf of Mexico and the Pacific.

Q. You are a man how old?

A. Thirty-nine the seventh day of June.

Q. And you are the owner and master of the "Eagle"? A. Yes.

Q. And you have likewise served as master and owner of other [319—251] vessels?

A. Yes, sir.

Q. Mr. Selig, was Mary Island light observable by you when you left the deck? A. Yes, sir.

Q. This, you say, was about twenty minutes before the collision?

A. Yes; fifteen or twenty minutes.

Q. That is a light of what magnitude, do you know?

A. That is a pretty strong light they have there.

Q. And on the night in question, it was easily seen? A. Yes.

Q. Your course, I believe you said, measured from Tree Point past Mary Island, bound north?

A. Yes, sir.

Q. You have been over that course how many times? A. Lots of times.

Q. Yes. That would take you past Mary Island with what clearance? A. One mile off.

Q. Did you notice then, when you left the deck, that you were on your course? A. Yes, sir.

Q. Which, if uninterrupted, would have gone on as indicated?

(Testimony of Steve Selig.)

A. Yes; that would have carried me right clear, fog or dark, any old weather.

Q. When the actual collision occurred, the impact of the vessels, I believe you said you were down in the engine-room? A. I was at the time.

Q. Tell us what took place in the engine-room; what, if anything about the condition of the engine?
[320—252]

A. Well, the first I knew that there was something happened, why I noticed they reversed the engine, and I noticed she was reversed in such a way that it wouldn't give lots of power because there was too much speed astern. I jumped up to the engine myself and slowed her down, because there was nothing but fire flying from it, usually does from any gasoline engine. I put some gasoline on the clutch so that she would take hold, and then it wasn't very long, because of the fact that everything was handy, I felt just a slight jar; very slight jar, and I thought, oh, that's just a log, and nothing to bother about.

Q. Would you be able to give us the lapse of time between the reversal of the engine and the sparks flying out and the impact or the slight jar that you speak of?

A. Well, very shortly, because I acted quickly, because I knew there was something up.

Q. Would you be able to estimate it in seconds?

A. Well, you can do it all in three seconds down there. You can throw the engine from full

(Testimony of Steve Selig.)

speed ahead to full speed astern in there in one second; that quick.

Q. How long would it take—I withdraw that. What is the normal speed of your boat?

A. Seven miles.

Q. And in what distance, if you know, can your vessel be brought to a stop and the engine cause her to go astern under reversed engines?

A. Well, if the boat is in good trim and the engine is working right, in a hundred and twenty-five feet, I think I can stop that boat, I'm pretty sure of it, going astern. [321—253]

Q. Could you be going astern within that time?

A. I think she would have a little headway astern; not very much.

Q. Within 100 or 125 feet, if your wheel is hard over to starboard or port what swing would she make, commencing now before you reversed your engine, commencing at your normal speed of seven miles per hour?

A. In a hundred and twenty-five feet, I'll make a half circle.

Q. Well, by a half circle, you mean a hemisphere, 180 degrees?

A. I mean sixteen points of the compass.

Q. Sixteen points of the compass; a complete half circle.

A. If you were headed north, you would be heading south. And from dead slow, I'll turn a 60-foot boat around in 125 feet.

(Testimony of Steve Selig.)

Q. And you take into consideration in starting, or going ahead, when you throw your wheel hard over, you were going ahead at the rate of seven miles per hour.

A. Well, no; the boat will slow down some.

Q. If you were going ahead seven miles per hour and throw your wheel hard over and reverse your engines at the same time, or approximately the same time, within what length would you make an eight-point turn?

A. She'll make it quicker with the speed she had ahead than the speed she has backing. It has a tendency to throw her pretty quick.

Q. Could you estimate—

Mr. COSGROVE.—(Interrupting.) I don't like to object to this line of testimony, but it is absolutely immaterial. It isn't what she can do; it's what she did do.

The COURT.—Yes. [322—254]

Mr. MARTIN.—I think it is material, if your Honor please.

The COURT.—Well, he may answer. Largely immaterial as I see it yet. I don't see the materiality of it.

Mr. MARTIN.—Depending; if your Honor please, upon the reasonableness of the respective claims.

The COURT.—Very well.

Q. At the time of the collision or impact, did you know that your vessel had come into contact with another vessel?

(Testimony of Steve Selig.)

A. I don't quite get you.

Q. Well, at the time you—at the time of the collision, could you tell what you had struck, or did you know that you had come in contact with another vessel?

A. No, sir.

Q. Did it do your own vessel any harm?

A. No, sir; it didn't even scratch the paint on her.

Q. Where are your wheel ropes with respect to your engine and your reverse gear down below in the engine-room?

A. Right over your head. You can see everything working right over your head.

Q. Is there anything in the way the wheel ropes work, or anything that you observed that would let you know whether they were turning at about the time of the reversal?

A. Oh, yes; I noticed we were getting up against something. I could see the wheel turning and the engine going full speed astern. That would indicate some danger of some kind.

Q. Did you afterwards ascertain whether the wheel had been thrown hard to starboard or hard to port, from the position of the wheel?

A. Yes, I noticed that myself. I was the man that took the wheel myself and I noticed the wheel was thrown hard to port. [323—255]

Q. And that hard aport wheel would have taken your vessel to the starboard?

A. I presume so.

Q. Did you observe anything floating away from the other craft, the "Wildwood"?

(Testimony of Steve Selig.)

A. After she settled alongside there was a small boat and hatches I seen floating away. That's all I seen go.

Q. You were on deck, were you?

A. I was on deck.

Q. Did you observe any fish floating away?

A. No, I couldn't see any fish floating away. I could see the fish in the hold when the boat sunk down, but I didn't see any float away.

Q. Where do you carry your fish cargo in your vessel?

A. My boat has carrying capacity aft.

Q. What effect would that have on the trim of the vessel?

A. It makes it a nicer boat to handle when they are loaded.

Q. Where does the "Wildwood" carry her fish?

A. She's a different boat altogether. Her machine sets aft and the cargo forward.

Q. If she is loaded with fish or loaded with cargo under those circumstances, what is the effect upon her wheel, upon her steering?

A. All the ships I have been in that was that way was a little hard to manage. They are down by the nose too much. They draw more water forward than they do aft. [324—256]

Q. After the collision and after your vessels were righted up and on their course, what, if anything, did the two young men on the "Wildwood" do?

A. Well, after we were on our course, going home, they went to bed.

(Testimony of Steve Selig.)

Q. What did they do?

A. They went to bed.

Q. Did they make any statement to you as to their fatigue or lack of sleep, or how many hours they had been on duty?

A. Not exactly to me, any more than what my men told me—

Q. (Interrupting.) Not what they told you. What, if anything, did you hear?

A. I didn't hear them say anything about sleep; not them two boys, neither one of them.

Q. Now, with respect to your own men, your own crew, had you, had they had a fresh night's sleep?

Mr. COSGROVE.—Just a moment. If you know, I presume.

Q. Yes; if you know?

A. No; myself I don't know. Really I never asked the boys about that.

Q. I mean your own crew?

A. Oh, my boys?

Q. Yes.

A. My boys appeared to be alright. We had long hours, ten hours Prince Rupert to town.

Q. Did you hear any statement made by the master of the "Wildwood" or by Mr. Brindle, in your presence, or on deck, as to how it happened, or did you direct any inquiry to them? [325—257]

A. Yes, I did. I asked them how it happened.

Q. You tell the judges just what you said. Give the details of the conversation, what was said.

(Testimony of Steve Selig.)

A. Well, after the boat had sunk and the lines were on her, we towed her in to shore a little and I figured on beaching her there, and I slowed my engine down. She was whirling me around there like this before I could get her to going straight, because she was sunk and just like that (showing) so I stopped and got her evened up so that we could tow her, and I said to the boys, "Now, tell me how this happened." See? And the boys just told me how this boat was and they placed her off the starboard bow about two points, and Mr. Ames said, "I tried to get clear, reversed my engine and throwed the wheel over and cut across the bow, and we were too close before they could get away from each other." That's the words that was told me on the boat.

Q. Mr. Ames told you that?

A. Mr. Ames, the man at the wheel.

Q. Did he make that statement to you in the presence of Mr. Brindle—

A. Yes, Mr. Ames is the man on my boat.

Q. Did he make that statement to you in the presence of Brindle and the other fellow?

A. At that time they were all on deck of the boat, but whether they heard it or not, I don't know.
[326—258]

Q. Respecting your exhaust, describe to the Court the kind of exhaust you had.

A. Well, coming up on the course that I was coming, I don't think that the exhaust on my boat could be heard a mile away on that night, because the exhaust on my boat is half under water, and if the

(Testimony of Steve Selig.)

boat was coming head on, that shuts it back. It has a brass outfit over that exhaust and it would throw the sound back toward Tree Point. The sound would naturally go back. It wouldn't come ahead.

Cross-examination by Mr. COSGROVE.

Q. The exhaust of your boat is half under water?

A. Yes, sir. When she is loaded, it's under water.

Q. Is your exhaust ever above the water—I mean your boat's exhaust?

A. When she's on the drydock.

Q. Is that the only time?

A. Yes, when she has any ballast any load, she is under water. When she is unballasted, she is half under water. At that time she was half under water. [327—259]

Q. Your exhaust could be heard a mile away, could it? A. I don't imagine it could; no.

Q. How far away do you imagine it could be heard?

A. Well, it couldn't be heard a mile away that night.

Q. How much less than a mile could it be heard?

A. Well, you might hear it five hundred feet.

Q. Could it be heard half a mile?

A. No, sir.

Q. You know anything about that?

A. I do.

Q. Well, now give us your best opinion so far as this is concerned, as to how far the exhaust of your

(Testimony of Steve Selig.)

engine could be heard on a dark, clear night.

A. When my exhaust is half under water, I imagine you could hear it five hundred feet; that's the best you could hear it. You could hear it that far and that's about all. Very quiet exhaust; lots of water. It's not a dry exhaust; it's a wet exhaust; water running through it. It's like one of those overhead Diesel boats.

Q. You remember what course you steered—from what point to Mary Island light?

A. I steered from Tree Point to Mary Island light.

Q. What was your course?

A. Northwest by west, half west.

Q. Northwest by west, one-half west?

A. Yes.

Q. That is from Tree Point light to Mary Island.

A. Yes; that's not an adjusted compass. That is my own compass and that is the course that takes me clear in my boat. That wouldn't run a steamship up there. That would land a [328—260] steamer maybe over on the Quadra side or down on Duke Island.

Q. Or somewhere else?

A. Yes; but that runs my boat. That is the compass I was navigating by.

Q. That is a course that is peculiar to your boat?

A. Yes; it wouldn't do for another boat.

Q. You don't know anybody else that steers that course between those two points?

(Testimony of Steve Selig.)

A. Different boats have different compasses.

Q. Now, when you left Prince Rupert, did you take the wheel? A. Yes, I did.

Q. Where were your two men?

A. They were with me aboard the boat all the time.

Q. What were they doing?

A. They usually take a little sleep at that time because of the narrows, and I wouldn't let my men have the wheel through there.

Q. Can't afford to trust them?

A. There's very few men knows the channel through there.

Q. But there is also another reason you didn't want to trust them coming out of Rupert?

A. Yes, I would trust those two boys.

Q. Huh? A. I would trust those two boys.

Q. Coming out of Rupert?

A. They weren't uptown in Rupert.

Q. How do you know they weren't?

A. They were aboard the boat. I had them pitching fish and I entered and cleared the boat.
[329—261]

Q. Did you go to town yourself?

A. I had to go to the customs-house and the American consul myself.

Q. How long were you in Prince Rupert on that trip?

(Testimony of Steve Selig.)

A. About six hours.

Q. How much of that time were you uptown?

A. I spent about two hours of that time getting around the customs-house and the American consul.

Q. You know where they were when you were uptown?

A. Pitching fish aboard the boat; tallying fish and pitching fish.

Q. That is, you left them there and found them there? A. I certainly did.

Q. Well, now, when you got aboard, you took the wheel? A. Yes, sir.

Q. How long did you keep the wheel?

A. Off and on I keep the wheel an hour, two hours, three hours.

Q. I mean on that afternoon?

A. Oh, I just don't remember how long I kept the wheel.

Q. Did you stay there until nine o'clock?

A. Oh, no; we take it shift and shift.

Q. Keep any record of it?

A. No, not running on a short run like that much.

Q. You keep a log-book?

A. No; I keep a little pocket-book, note-book down aboard the boat, you know.

Q. Do you remember how long you were on, you were at the wheel that afternoon?

A. Oh, no; we don't keep track of how long each man is at the wheel. [330—262]

Q. Give us your best recollection.

(Testimony of Steve Selig.)

A. My best recollection is that we steered the boat from ten minutes past three—

Q. (Interrupting.) I'm talking about you now.

A. (Continuing.) Until half-past ten, between the three of us, and I had my trick at the wheel.

The COURT.—He wants to know how long you stayed at the wheel?

A. I can't answer that question, because I never timed myself.

Q. When did Joe Olander steer?

A. Well, we all took a trick at the wheel.

Q. Did you that afternoon?

A. Yes, I did.

Q. Did Olander take the wheel?

A. Yes, he did.

Q. Where is he now?

A. Mr. Olander, as far as I can understand, he is out trapping.

Q. When did he get away?

A. So far as I was informed, he is gone about six weeks or a month.

Q. You met him in Seattle?

A. I did not.

Q. Did you see him there? A. No.

Q. How long before that did you see him?

A. I haven't seen him, it must be six or seven weeks; probably a little more than that.

Q. Did you see him six or seven weeks ago?

A. It's about that time, I think.

Q. You knew at that time this case was to be tried, did you not? [331—263]

(Testimony of Steve Selig.)

A. No; I didn't know it at that time.

Q. Oh, you didn't know this case was going to be tried at this court?

A. No; we offered you a settlement since that time.

Q. Yes, but you took no precautions to maintain the presence of Olander in the event your offer of settlement was not accepted?

A. We offered you a settlement and still we was making preparations for hearing this case.

Q. Your preparations did not include the detention of Mr. Olander?

A. At that time Mr. Olander went out somewhere and hadn't come back yet, and I can't find out where he is.

Q. You took no precaution to insure his presence in the event that the settlement was unsuccessful?

A. None whatever.

Q. Even though you knew at that time that he was the man who was in the pilot-house with Mr. Ames, the helmsman at the time of the collision?

A. Yes, he was the man that was there.

Q. And you knew that at that time?

A. Yes, I knew that he was there, in the pilot-house.

Q. You don't remember how much of the voyage from Rupert on that occasion it was that Mr. Olander steered?

A. Well, you can divide it into three—nine hours practically between the three of us. That is as near as I can give it to you.

(Testimony of Steve Selig.)

Q. Well, I just want to know what kind of a division it was—how much of it did you take, what part of it, day or night? [332—264] Could you tell whether it was two to three or two to four—

A. (Interrupting.) Well, from three o'clock in the afternoon until ten o'clock at night is part daylight and part dark.

Q. Yes.

A. And the three of us steered during that time, and I said our watches usually ran probably three or four hours apiece, which would be the nine hours divided by three. You put me down for three hours, Mr. Olander for three hours and Mr. Ames three hours.

Q. Which of the three did you take?

A. I took the first three through the channel?

Q. Who took the second three?

A. Mr. Olander.

Q. Who took the third? A. Mr. Ames.

Q. But, I know, but you testified during your direct examination that you had just given up the wheel to Ames.

A. I didn't say any such a thing.

Q. What did you say about it?

A. Mr. Olander gave the wheel to Mr. Ames.

Q. In your presence?

A. I sat in the pilot-house reading.

Q. You had the lights all lit up there.

A. Yes, sir.

Q. How long had you been reading there?

A. I was reading—it was daylight all the way,

(Testimony of Steve Selig.)

and when it got dark I switched the lights on and went below.

Q. Had you been reading during the time the lights were turned on?

A. I switched the lights on and read a minute. I had been reading [333—265] till it got dark enough to put the lights on and put the lights on and went below to oil my engine up and I was getting ready to go to bed.

Q. You didn't read around there after you turned the lights on in the pilot-house?

A. No, I didn't say that.

Q. What was your idea in turning the lights on in the pilot-house after dark?

A. I had to see. I was reading and didn't finish.

Q. Don't you know, as a mariner, with the experience that you have had, that turning the lights on in the pilot-house shuts off your view from the outside?

A. Yes, but I'm telling you that I shut them off and went out.

Q. No, you didn't either. You said you turned the lights on to read by, to see, and then went down below.

A. Well, I did. You wouldn't think I would go below with the lights on in the pilot-house.

Q. What did you do, turn them on again?

A. You would turn your lights off in the pilot-house.

(Testimony of Steve Selig.)

Q. I'm not asking you what you would do, or I would do, but what you did do.

A. That's what I did do.

Q. Then you turned them on and how long did you read? A. Oh, probably a minute.

Q. Can you fix it any more definitely?

A. Just a minute.

Q. Oh, you read just a minute?

A. Just a minute; sure.

Q. Then you turned them out? [334—266]

A. Turned the lights out in the pilot-house, or the light in the pilot-house. One light, that's all that's in the pilot-house, over the berth.

Q. Then you went below? A. I did.

Q. Are you sure, Mr. Selig, when you turned that light out, you didn't turn your masthead and your side-lights out?

A. No, sir; I didn't turn them out. They were below.

Q. How did you get that idea?

A. I got a look at them when I passed them.

Q. Going into your pilot-house, or going out of your pilot-house?

A. When I stepped out of my pilot-house door, I could see; one port light looked me in the face.

Q. It is not above the head, then, is it?

A. It's right there, looking right at you.

Q. That's not over your head.

A. That light you speak of?

Q. Yes. A. That port light?

Q. Yes.

(Testimony of Steve Selig.)

A. Just that high over your head (showing).

Q. Can your side-lights be seen above the house, say, from the "Wildwood," if the "Eagle" were head on? In other words, is the pilot-house— I suppose that the side-lights are on top of the pilot-house? A. Yes.

Q. Now, suppose the "Eagle" was coming on, head on, to the "Wildwood"? A. Yes. [335—267]

Q. Could a person on the other side see the side-lights of the "Eagle"?

A. You can see them if you are right ahead or anywhere around near there.

Q. In other words, the pilot-house of the "Eagle" would be very much above the cabin or the pilot-house of the "Wildwood"?

A. Oh, no; she stands up higher in the water. She has to stand inspection before she can go out, and pass.

Q. I'm talking about what a person could see. Here (pointing) is the "Wildwood" and suppose the "Eagle" comes on that way. Could the side-lights be seen over the top of the "Wildwood"?

A. Over the top of her?

Q. Yes.

A. You mean on board the "Wildwood"?

Q. No. Are not your side-lights higher than the cabin or pilot-house of the "Wildwood"?

A. Well, my side-lights on the pilot-house would have to be about probably a foot higher than the "Wildwood's" cabin and house is.

(Testimony of Steve Selig.)

Q. So they could be very readily seen from the other side? A. I imagine so; yes.

Q. All right. Now, you had been down in your cabin about how long before the collision happened?

A. I was there about fifteen minutes.

Q. What were you doing?

A. I oiled my engine up and was making my berth up; just getting ready to lay down.

Q. All your lights burning? A. Fine.

Q. Were all those lights burning while you were up in the pilot-house? [336—268]

A. The lights were burning.

Q. Down in the cabin?

A. Lights burning in the cabin down below.

Q. You turned them on the same time that you did the others?

A. I have a switch down below for those lights.

Q. Did you turn them on after you got down there, or were they turned on before you got down there? A. The lights in the cabin?

Q. Yes.

A. I turned them on a little bit before; went out of the pilot-house, put the lights on and read a minute or two.

Q. You turn all your lights on from the pilot-house, do you? A. All my running lights.

Q. Is it customary for you to turn your lights on yourself when you are traveling?

A. Well, that's a lookout for a man that owns a boat like I am. I have to look out for those things, and it is my duty to look out for my interest.

(Testimony of Steve Selig.)

Q. You say that that night, the 23d of July, was a dark night? A. Well—

Q. Did you pay much attention to it?

A. I know what kind of a night it was. I seen lots darker nights and lots brighter ones.

Q. What is your idea about that night—pretty dark?

A. That was a fairly dark night. It wasn't what you would call a real dark night.

Q. Not clear? A. Calm.

Q. You were traveling through some deep shadows, were you not? [337—269]

A. It was kind of shadowy on the mainland shore. Point Alva shows dark land. It is harder to come into the land than it is going to *see*.

Q. I realize that. And these shadows that were caused by the mountains on Point Alva shore were pretty heavy?

A. Shadowy water and the water was calm.

Q. When did you run into them; what time?

A. Ten twenty.

Q. Run into the shadows then?

A. Oh, the shadows would be, the shadowy land at that time, the mainland shore we had been running in that for about twenty minutes before the collision.

Q. Do you mean to tell me that Mount Alva doesn't cast shadows over the water sooner than twenty minutes.

A. The closer you come to Mary Island, you come to a peak or the narrowest place, naturally you

(Testimony of Steve Selig.)

come to within where the shadows would come in closer to you, so out here (pointing) the land is further away from you than it is in here (pointing), and we was coming gradually into that deep shadow.

Q. Where did you first strike the shadow. It hadn't been dark very long?

A. As I said, twenty minutes, that was putting us close to where we hit.

Q. That was the dangerous part of your trip, wasn't it, when you went into those shadows?

A. Yes; that's kind of dangerous.

Q. You have no insurance on your boat?

A. Yes, sir. [338—270]

Q. What was your idea in going to bed then? Why didn't you stay up and see your boat through the deep shadows?

A. It's not necessary to stay up when you have got a navigator like I am aboard.

Q. But you weren't doing the navigating at that time? A. I was.

Q. I thought you said you went below?

A. I give them the course from time to time and tell them if anything comes up, call me.

Q. And they did call you after they had run down another boat? That is true, is it not?

A. No, they didn't call me.

Q. Then they didn't call you?

A. I came up there myself.

Q. What in the world called your attention to the fact that you had run into a boat?

(Testimony of Steve Selig.)

A. Called my attention to it?

Q. Yes.

A. The engine was going full speed astern and the wheel ropes turning in my berth.

Q. You didn't feel a jar or impact of striking this boat?

A. Yes; a slight jar. It wouldn't be any more than if it hit a cigar-box.

Q. Have you seen the "Wildwood"?

A. She is down here. I seen her to-day. Look out the window and you can see her.

Q. You noticed how she was damaged?

A. Yes.

Q. I wonder what would have happened to her if your boat was going full speed, if the engine had not been reversed. [339—271]

A. If we had hit her square, we'd went through her and probably never noticed it.

Q. What your boat did do was just to draw up to her side and push her away?

A. Glancing blow; that's all; just a slight glancing blow.

Q. Of course, you are not familiar with the circumstances of the collision, having been down below for twenty minutes?

A. I could feel the jar.

Q. I thought you said there was no jar; that you couldn't feel it.

A. Yes, but it didn't knock me down. It wasn't like it would knock you down off your feet.

Q. But you were in bed at the time?

(Testimony of Steve Selig.)

A. No; I was not. The engine was going full speed. I was standing at the engine. I never got a chance to get into bed.

Q. It didn't take you fifteen minutes to get down there from the deck.

A. Yes, but I didn't tell you I was fifteen minutes in bed. I told you I oiled my engine up and was making my berth up, getting ready to go to bed.

Q. How long had you been working on the engine?

A. To oil a machine like that it might take you five, ten or fifteen minutes, you know, if you do it right.

Q. Did you spend any time making up your bed?

A. Oh, yes.

Q. How much time?

A. Oh, I don't think you could make up a nice bed like we have on board those boats in less than five minutes, three, four or five minutes. [340—272]

Q. Which did you do first?

A. I made up the bed.

Q. Then you got into it?

A. No, I never got quite into it.

Q. What makes you believe that this collision occurred at twenty minutes past ten?

A. I figured the time at twenty minutes past ten. That's what time it said by our clock in our vessel. I couldn't tell you what it said by the Mary Island clock.

(Testimony of Steve Selig.)

Q. You had been twenty minutes away from the pilothouse?

A. Between fifteen and twenty minutes.

Q. So that it was about ten o'clock when you entered these shadows, was it, that you speak of, or was it before that?

A. I told you that we probably had been running in the shadows probably twenty or thirty minutes.

The COURT.—Just answer the question. Was it before or after; not what you told him.

A. We were running in the shadows from twenty minutes before we hit the boat until we hit the boat.

Q. How was the night before you struck this shadowy area?

A. How was the night before this?

Q. Yes.

A. I can't remember what it was the night before this one.

Q. I'm talking about conditions the same night?

A. How was the night before we struck the shadows?

Q. How were conditions generally—clear and bright? A. Oh, yes; fine evening.

Q. Fine moon?

A. No, not at that time there was no moon. Moon had just come over the mountains. [341—273]

Q. Then it was pretty dark from half-past seven on? A. No, not in the summer time.

Q. How was it that night?

A. No, it wasn't dark, very dark, you know, at that time of the year, you know.

(Testimony of Steve Selig.)

Q. Well that night it got pretty shadowy along about eight o'clock, you say?

A. Half-past eight?

Q. No, about eight?

A. No, it wouldn't be getting dark until nine o'clock.

Q. Nine o'clock? A. Yes.

Q. Well, you didn't pay much attention to the darkness, did you?

A. Oh, not particularly, you know.

Q. Well, your recollection is that it didn't get dark until about nine o'clock?

A. Somewheres along there; summer-time, July, you know.

Q. But your recollection of conditions that night is that it was pretty dark about that time?

A. Getting dusky.

Q. How dark would you say it was along about nine o'clock, pretty dark?

A. Well, you'd call it dark.

Q. Why didn't you turn your side-lights on then? Why did you wait till after ten o'clock?

A. At nine o'clock?

Q. Yes.

A. It wasn't dark enough for that, because you couldn't see Mary Islands at that time yet, Mary Island flash at that time, but *I flash* could manage to pick up Hog Rock and Black [342—274] Rock.

Q. You didn't turn on your lights at nine o'clock?

A. No, I didn't.

Q. And you say it was getting pretty dark?

(Testimony of Steve Selig.)

A. Getting dusky.

Q. And you waited more than an hour before you turned them on, didn't you?

A. No, I didn't wait more than an hour.

Q. How long did you wait?

A. I turned them on shortly after that.

Q. What time did you turn them on?

A. That I couldn't say, what time I turned them on.

Q. I thought you told me it was fifteen minutes before you went down below?

A. It was fifteen minutes before I went down below.

Q. All right. What time did you go down below?

A. I went down below about ten by our clock.

Q. All right. Now, figure out what time you turned them on?

A. But my clock ain't by your clock.

Q. Oh, you've got your own kind of clock, too?

A. The boat has a different clock; maybe two minutes difference in time.

Q. As a matter of fact, Mr. Selig, you never turned them on that night. Isn't that so?

A. No, sir; I did turn them on.

Q. Let's see if I understand you right. I don't want to do you any injustice. You turned those lights on just before you went below, did you?

A. Yes, I switched the lights on in the pilot-house at nine o'clock. [343—275]

(Testimony of Steve Selig.)

Q. Now, you read a minute? Isn't that your statement? A. Yes, I did about a minute.

Q. Then you turned out your reading light and you went below? A. Yes.

Q. All right. That was ten o'clock, wasn't it?

A. By our clock, it was.

Q. Yes. Is that the same time that you carry in your watch? A. No.

Q. What is the difference between the clock on your boat and the time on your watch?

A. Well, any time when we are working like that on a boat, lots of times your clock ain't the same as the clock in town.

Q. Now, then, you read a minute; then you turned this reading light out? A. Yes.

Q. Then you went below? A. Yes.

Q. And the collision occurred twenty minutes later? Is that right?

A. Fifteen, twenty minutes later.

Q. All right; then you turned those lights on at ten o'clock?

A. Take your own figures for it.

A. Well, if you do take my figures for it, you would find it dark at half-past nine.

Q. I thought you said at nine o'clock it got dark.

A. Dusky, I said.

Q. As a matter of fact, it was dark at eight o'clock and you paid no attention to it?

A. How's that? [344—276]

Q. I say, as a matter of fact, it was dark at eight o'clock and you paid no attention to it?

(Testimony of Steve Selig.)

A. No; it wasn't dark at eight o'clock.

Q. Do you remember anything about it?

A. In July, the 23d of July, I know when it gets dark.

The COURT.—Well, do you know yourself, that particular night. We all know what it is like in July, but the question is what was it like on that night?

Q. Give us your recollection.

The COURT.—Do you remember that night?

A. It don't get dark on July 23d.

The COURT.—That night.

A. Well, that night it didn't get dark no more than dusky at half-past nine.

Q. Do you remember what the conditions were at that time, that night?

A. No, I don't; yes, I remember, too.

Q. Isn't it a fact that you had a bright moon that night and there was no darkness? I'm talking about what you remember now, Mr. Selig.

A. That is not a fact that there was a bright moon that night.

Q. Then it was dark at the time?

A. There was a moon, but the moon was not bright; it was very cloudy and it just come over the mountain.

Q. Yes, and it lit up the waters?

A. We weren't within the range of that moon. I was to the south of that moon.

Q. It would light up the waters anyway, wouldn't it? [345—277]

(Testimony of Steve Selig.)

A. It would ahead of me in a line more than it would down where I was.

Q. But the moon shining on the water gives the whole area a brighter appearance.

A. Well, it will if it is a bright moonlit night, if it is a bright moon, but not a cloudy night.

Q. Well, that was a full moon, wasn't it?

A. No, I think the moon had taken off a few days before that.

Q. But substantially full, practically full, when it come out from behind the clouds.

A. It hasn't got the brightness of a full moon.

Q. No, naturally, but almost as bright as a full moon? A. If it was clear.

Q. That was a clear night?

A. There were some clouds.

Q. I'm talking about the clearness.

A. Clearness on the water? It was a nice day and calm.

Q. Now, then, when the moon came up from behind the clouds, it would light up the whole waters, would it?

A. No, it wouldn't light up the whole waters around like these.

Q. Do you remember anything about it?

A. It never lit up any waters.

Q. Do you remember anything about it?

A. That it didn't light up the waters?

Q. Yes. A. I do.

Q. Now, your boat, you say, runs along at seven miles an hour?

(Testimony of Steve Selig.)

A. About seven miles an hour.

Q. She'll do a whole lot more? [346—278]

A. No.

Q. Do you say that the "Eagle" can't make any more than seven miles an hour?

A. Not much; she may make a little more.

Q. You can stop her within a hundred and twenty-five feet?

A. Yes, within a hundred and twenty-five feet.

Q. You mean if you are at the wheel or do you mean at the engine?

A. If I am at the engine I can stop her.

Q. Did you stop her that night?

A. No, I didn't stop her. Mr. Olander reversed the engine.

Q. It was all done from the pilot-house?

A. Everything was done from the pilot-house.

Q. And you don't know what happened in the pilot-house, do you? A. Before or after?

Q. At any time after you left the pilot-house, you don't know what happened then?

A. I don't know what happened in the pilot-house?

Q. No. You don't know what happened except on hearsay. You don't know who was there or what their condition was, or what they did do?

A. Well, Mr. Olander and Mr. Ames was in the pilot-house.

Q. But you don't know that Mr. Ames was at the wheel?

A. Mr. Ames was at the wheel when I was there?

(Testimony of Steve Selig.)

Q. And you left him in charge of the wheel, did you not, or was Mr. Olander in charge?

A. Mr. Ames was in the pilot-house, at the wheel.

Q. When you were there, did you notice any empty whiskey bottles in the pilot-house? [347—279]

A. There may be a dozen bottles there lying around there. I never noticed any, though.

Q. If there were a dozen there, you would have noticed at least one of them, Captain?

A. Yes, but I didn't notice any there.

Q. The boys testified that there were several whiskey bottles around there. You say you didn't notice any at all?

A. No; there may have been a dozen.

Q. And you don't know whether Al Ames and Joe Olander had any whiskey there or not, do you?

A. They had no whiskey that I seen.

Q. And you didn't have any?

A. No; I didn't have any.

Q. You never had any aboard that boat since prohibition went into effect?

A. No, you had it all up in your office.

Q. When you came from Rupert that afternoon, you didn't bring any with you?

A. Didn't bring anything, absolutely nothing.

Q. So that night Mr. Ryan says that you offered him a drink, but that is not true, is it?

A. It is not true, no.

Q. Did you have a bottle of acid down there in the forecastle?

(Testimony of Steve Selig.)

A. No; I couldn't say that I had a bottle of acid.

Q. Your counsel asked Mr. Ryan if he didn't know that that was a bottle of acid because you took a drink of it and offered him one. Did you have any such bottle there?

A. Yes, there was a bottle there, but I noticed they didn't take a drink of it. [348—280]

Q. Was it a bottle of acid?

A. No; it wasn't acid.

Q. Do you mind telling us what it was?

A. It was distilled water. [349—281]

**Testimony of Leo. Frank Ryan, for Claimant
(Recalled).**

LEO. FRANK RYAN, recalled as a witness on behalf of the claimant, having been previously sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. Mr. Ryan, when you say you saw the lights flash on about a hundred or a hundred and twenty-five feet out there in the darkness, you didn't blow any whistle at all. A. I did not.

**Testimony of Carrington C. Keesling, for
Claimant (Recalled).**

CARRINGTON C. KEESLING, recalled as a witness on behalf of the claimant, having been previously sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. Mr. Keesling, at my request, did you go back

(Testimony of Carrington C. Keesling.)

to the "Wildwood" this afternoon to look at her stem piece? A. I did, sir.

Q. At the bow? A. Yes, sir.

Q. Did you find anything wrong with it, damaged? A. No, sir.

Cross-examination by Mr. COSGROVE.

Q. How careful an examination did you make?

A. I made a good examination.

Q. How much time did you spend on it?

A. I was there about twenty minutes at the stem; then examined the whole port side.

Q. You made an examination of the port side?

A. Yes, sir; I went over it.

Q. Are you in a position now to increase your bid \$300 for that job? [350—282] A. No, sir.

Q. What is it worth now?

A. The same price as it was before.

Q. Well, it didn't lose any value, then?

A. Only in deterioration; that's all. [351—283]

AFTERNOON SESSION—Jan. 23, 1922.

Mr. MARTIN.—We want to explain, for the purposes of the record, that those (exhibiting lights) were all the "Wildwood's" lights.

Mr. COSGROVE.—No; we lost the range-light when we were bumped.

Mr. MARTIN.—That's all.

The COURT.—Is that all the evidence? What's the necessity. Any objection?

Mr. COSGROVE.—Beg pardon?

The COURT.—Any objection to this character or kind of lights?

Mr. COSGROVE.—No, your Honor; I think not.

The COURT.—They may be admitted in evidence.

(Received and marked.)

Mr. MARTIN.—There is one further question that I wanted to ask Mr. Leo Ryan that I don't think the record is clear on. Mr. Cosgrove has agreed that I might ask this question.

The COURT.—What is the question?

Mr. MARTIN.—The question is concerning the pilot-house arrangements, etc.

The COURT.—You may ask that.

Testimony of Leo. F. Ryan, for Claimant (Recalled).

LEO. F. RYAN, recalled as a witness on behalf of the claimant, having been previously sworn, testified as follows:

Direct Examination by Mr. MARTIN.

Q. Mr. Ryan, you were sworn before and are the same Mr. Ryan who was master of the "Wildwood" at the time of the collision? [351-A—284]

A. Yes, sir.

Q. I believe you stated that shortly before the collision you had occasion to leave the pilot-house and go to consult Mr. Brindle who was down below? A. Yes, sir.

Q. There isn't any pilot-house control on your engine so that you have to go down below to reverse or stop, or change the speed of the engine?

(Testimony of Leo. R. Ryan.)

A. No, there is a pilot-house control on her, on the engine.

Q. Oh, you have a pilot-house control?

A. Yes.

Q. But to communicate with anyone below, as you did with Mr. Brindle on the night in question, it was necessary for you to leave the pilot-house and go down to speak to him? A. Yes, sir.

A. And you did that? A. Yes.

Q. Now, what distance is that, and what steps did you take to communicate with him? That is, leaving the pilot-house, where was he located, aft or forward?

A. Well, about eight steps into the fore-castle of the boat. The boat had two compartments, a fore-castle and an engine-room, and the engine-room was right below the pilot-house.

Q. You stepped out of the pilot-house, we'll say, to the right or left on the deck? A. Yes, sir.

Q. And then stepped from the deck forward to the [352—285] companionway and went down this little companionway—

The COURT.—Ask him what he did.

Q. Well, say what you did.

A. No, I stepped out on deck, and I didn't go up to the companionway. I just hollered to him down the companionway. The door was open.

Q. How far is it from the pilot-house?

A. Possibly eight feet; not more than eight feet.

Q. Not more than eight feet. And you ran down—do I understand you to say that you ran

(Testimony of Leo. F. Ryan.)

down or spoke down the companionway to Brindle?

A. I spoke to him down the companionway.

Q. He then gave you the course?

A. He gave me the course.

Q. Was there anyone in the pilot-house during the time that you were off from the pilot-house, speaking to Mr. Brindle? A. There was not.

Q. You and Mr. Brindle were the only men on board? A. Yes.

Cross-examination by Mr. COSGROVE.

Q. How long did that take you?

A. It didn't take me more than about twenty or thirty seconds; not more than thirty seconds.

Q. How long before the collision did that happen? A. About six or seven minutes. [353—286]

Redirect Examination by Mr. MARTIN.

Q. Did you have a range-light that night on your boat? A. We did.

Q. Where is that range-light, do you know?

A. Well, I guess it fell off the boat.

Q. Do you know whether that range-light was lighted or not?

A. I am quite positive it was lighted. I know it was lighted.

Q. What size was it, the range-light?

A. Well, it was the regular light, a regular lantern.

Q. How high above the deck?

A. Well, it was eight feet above deck.

(Testimony of Leo. F. Ryan.)

Q. Was it on the same mast with the mast head-light? A. It was not.

Q. Where was it located? A. It was located on top of the pilot-house.

Q. The pilot-house was aft on the vessel?

A. Aft.

Q. Would you swear positively that that range-light was lighted before this collision. Do you know of your own knowledge that that was a fact?

A. I do.

Q. Why didn't you say so when you testified before? A. You didn't ask me.

Q. I asked you the number of lights and you told me that there was one light—

Which was all the evidence offered or received and other proceedings had on the trial of said cause.
[354—287]

Territory of Alaska,
Division No. One,—ss.

This is to certify that the foregoing, pages 3 to 289, inclusive, is a true, complete and properly prepared statement of all of the testimony with the exception of the depositions, introduced upon the trial of said cause on the hearing of the merits in the above-entitled court at Ketchikan, Alaska, on January 19, 20 and 23, 1922, together with all objections and exceptions made and taken to the admission or exclusion of evidence and all motions and rulings by the court thereon made upon said trial together with the original exhibits offered and

admitted in evidence upon said trial and consisting of—

Libelant's exhibits.

Claimant's exhibits.

Dated at Juneau, Alaska, July 1, 1922.

THOS. M. REED,

Judge of the District Court, District of Alaska,
Division No. One, Presiding at the Trial of
Said Cause.

Filed in the District Court, District of Alaska,
First Division. Jul. 1, 1922. John H. Dunn,
Clerk. By ———, Deputy. [355—288]

Notice of Appeal.

To Mary L. Brindle, Executrix of the Last Will of
Alexander Brindle, Deceased, Libelant in the
Above-entitled Cause, and to Charles H. Cos-
grove, Esq., Her Proctor:

You and each of you will please take notice that
S. L. Selig, the above-named claimant, hereby ap-
peals from the final decree of the above-entitled
court in the above-entitled cause, and from the
whole thereof, which decree was made, entered and
filed in the above-entitled cause on the — day
of June, 1922, to the United States Circuit Court
of Appeals for the Ninth Circuit.

S. L. SELIG,
Claimant.

Proctor for Claimant.

Due service of the within notice of appeal after
the filing of the same in the office of the clerk of

the above-entitled court admitted this 12th day of June, 1922.

CHAS. H. COSGROVE,
Proctor for Libelant.

Filed in the District Court, District of Alaska,
First Division. June 13, 1922. Jno. H. Dunn,
Clerk. By M. D. Morrissey, Deputy. [356—289]

Order Fixing Supersedeas and Cost Bond.

Upon the motion of the claimant for order fixing the amount of supersedeas and of bond for costs on appeal,—

IT IS ORDERED that the amount of the bond to be given in the above-entitled cause by claimant therein upon appeal to cover costs on appeal and to act as a supersedeas be and the same hereby is fixed in the sum of \$250.00—TWO HUNDRED AND FIFTY DOLLARS—for costs on appeal, and the further sum of \$2500.00—TWENTY-FIVE HUNDRED DOLLARS—to act as a supersedeas.

Dated this 15th day of June, 1922.

THOS. M. REED,
Judge.

The foregoing order may be entered.

CHAS. H. COSGROVE,
Proctor for Libelant.

Filed in the District Court, District of Alaska,
First Division. Jun. 15, 1922. John H. Dunn,
Clerk. By M. D. Morrissey, Deputy.

Entered Court Journal No. D, page 270. [357]

Stipulation and Order Re Filing Bill of Exceptions.

The parties hereto stipulate by and through their respective proctors as follows:

That claimant may have ninety days from and after the date of the adjournment of the Court for the term within which the decree on behalf of the libelant in said cause was entered, within which to have reduced to form, settled and allowed, a bill of exceptions in said cause.

In the event the term of Court during which the final decree was entered has ended before the entry of an order extending the time in accordance with this stipulation, then the said term shall be deemed extended for the purpose of entering this order and the time shall be by the Court extended ninety days from the date of expiration of said term whether the order be made before or after adjournment, with the same force and effect as if the same had been entered before such adjournment and before the close of the term of said Court during which final decree was entered.

IN WITNESS WHEREOF the parties hereto have set their hands by and through their respective proctors this 12th day of June, 1922.

CHAS. H. COSGROVE,

Proctor for Libelant.

WINTER S. MARTIN,

Proctor for Claimant. [358]

ORDER.

Upon reading the above stipulation it is ordered that claimant have ninety days from and after the

date of adjournment of the court for the term within which the decree on behalf of libelant in the above-entitled cause was entered, within which to have reduced to form, settled and allowed a bill of exceptions in said cause.

Dated this 15th day of June, 1922.

THOS. M. REED,
Judge.

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1922. John H. Dunn, Clerk. By M. D. Morrissey, Deputy.

Entered Court Journal, No. D, page 270. [359]

Stipulation Extending Time Within Which Appellate Record May Be Lodged in the Clerk's Office of the Circuit Court of Appeals for the Ninth Circuit.

IT IS STIPULATED in the above cause between the parties hereto that claimant and appellant may have until the 1st day of October, 1922, within which to lodge the appellate record in the above-entitled cause in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and the above-entitled court may make an order upon this stipulation enlarging the time within which to lodge the appellate record and to file and docket said cause in said Court of Appeals to and including the 1st day of October, 1922.

WITNESS my hand at Seattle, Washington, this 20th day of June, 1922.

WINTER S. MARTIN,

Proctor for Claimant-Appellant.

WITNESS my hand at Ketchikan, Alaska, this 26th day of June, 1922.

CHAS. H. COSGROVE,

Proctor for Libellant.

Filed in the District Court, District of Alaska, First Division. Jun. 28, 1922. John H. Dunn, Clerk. By W. B. King, Deputy. [360]

Order Extending Time to Lodge Record on Appeal.

It is ordered that the time within to lodge the appellate record in the above-entitled cause in the office of the Clerk of the Court of Appeals for the Ninth Circuit may be and it hereby is enlarged and extended from the date of its expiration under the rule of Court to and including the 1st day of October, 1922

Dated at Juneau this 28th day of June, 1922.

THOS. M. REED,

Judge.

Filed in the District Court, District of Alaska, First Division. Jun. 28, 1922. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. R, page 275-Juneau. [361]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That We, S. L. Selig, of Ketchikan, the above-named claimant, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound unto Mary L. Brindle, Executrix of the Estate of Alexander Brindle, deceased, libellant, in the full sum of TWO HUNDRED AND FIFTY (\$250.00) DOLLARS, and in the further sum of TWENTY-FIVE HUNDRED (\$2500.00) DOLLARS, to be paid to the said Mary L. Brindle, executrix of the estate of Alexander Brindle, deceased, libellant, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of June, 1922.

WHEREAS, S. L. Selig, as claimant of the gas boat "Eagle," her engine, apparel, tackle and furniture, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree of the District Court of the District of Alaska, First Division, bearing date the — day of June, 1922, in a suit in which Mary L. Brindle, executrix of the estate of Alexander Brindle, deceased, is libellant, against the gas boat "Eagle," her engine, tackle, apparel and furniture, which decree orders the said gas boat "Eagle" and her stipulators to pay libellant the sum of \$2,006.80; and

WHEREAS, [362] S. L. Selig, claimant, desires during the process of such appeal to stay the execution of the said decree of the said District Court; and

WHEREAS, the said District Court having fixed the amount of supersedeas at TWENTY-FIVE HUNDRED (\$2500.00) DOLLARS:

NOW, WHEREFORE, the condition of this obligation is such, that if the above-named appellant, S. L. Selig, shall prosecute said Appeal with effect and pay all costs which may be awarded against him as such appellant if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in this cause, or on the mandate of said Court by the Court below, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

S. L. SELIG,
Principal.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

By R. E. ROBERTSON,
Its Attorney-in-Fact,
Surety.

Approved this 21st day of June, 1922.

CHAS. H. COSGROVE,
Proctor for Libellant.

Approved this 15th day of June, 1922.

THOS. M. REED,
Judge.

Filed in the District Court, District of Alaska, First Division. Jun. 21, 1922. John H. Dunn, Clerk. By M. D. Morrissey, Deputy. [363]

Order Enlarging the Time Within Which Appellate Record may be Lodged in the Court of Appeals.

Upon the application of claimant in the above-entitled cause, after reading the affidavit of claimant's proctor, the Court being duly advised as to the propriety of granting the same,—

IT IS BY THE COURT ORDERED that claimant and appellant in the above-entitled cause may have the period of one month from and after the first day of October, to wit, until the first day of November, 1922, within which to lodge the Appellate Record in said cause within the office of the clerk of the United States Circuit Court of Appeals, for the Ninth Circuit; and the time within which said record may be lodged therein, and said cause docketed, may be and it hereby is extended and enlarged from the first day of October to and including the first day of November, 1922.

Dated at Juneau, Alaska, September 18, 1922.

THOS. M. REED,

Judge of the District Court of Alaska, Division No. 1.

Filed in the District Court, District of Alaska, First Division. Sep. 18, 1922. John H. Dunn, Clerk. By —————, Deputy.

Entered Court Journal Civil "R," page 358.
[364]

Order Sending Up Original Exhibits.

Upon the application of the claimant for an order sending the original exhibits and original bill of exceptions to the Court of Appeals as part of the appellate record in the above-entitled cause on appeal, and it appearing to the Court that the original exhibits and original bill of exceptions may properly be included in the appellate record and forwarded as part of the record by the Clerk of this court, instead of copies thereof,—

IT IS NOW ORDERED that all the original exhibits introduced in evidence and filed herein, be sent by the clerk of this Court as part of the record on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, instead of copies thereof. Ship's lamps excepted from order to send up original exhibits.

Dated at Juneau, Alaska, September 18th, 1922.

THOS. M. REED,

Judge of the District Court of Alaska, Division
No. 1.

Filed in the District Court, District of Alaska,
First Division. Sept. 18, 1922. John H. Dunn,
Clerk. By —————, Deputy.

Entered Court Journal Civil "R," page 358.
[365]

Assignments of Error.

Now comes Steve Selig, the claimant of the gas power boat "Eagle," and respondent in above cause, by his proctor, Winter S. Martin, and says that in the record and proceedings in said cause and in the final decree entered therein, there is manifest error in the following particulars:

1. The Court erred in entering a decree finding the claimant and respondent Steve Selig solely at fault in the collision between the "Wildwood" and the "Eagle."

2. The Court erred in not finding the said colliding vessels, "Wildwood" and "Eagle" and their respective owners and masters mutually at fault.

3. The Court erred in not dividing the damages resulting from the collision equally between the owners of said respective vessels upon the ground of mutual fault.

4. The Court erred in finding that the "Wildwood" had the right of way, for it appears from the testimony that the vessels were nearly end-on when they first observed each other.

5. The Court erred in finding that the "Eagle" starboarded her helm and turned to port toward the Mary Island shore.

6. The Court erred in finding that if the "Eagle" had put her helm to port, she would have cleared the "Wildwood." [366]

7. The Court erred in concluding that the proximate cause of the collision was the negligence of the "Eagle."

8. The Court erred in not finding the "Wildwood" at fault for the failure to maintain a proper and efficient lookout immediately prior to the collision, when from all the evidence it clearly appears that if such lookout had been kept on the "Wildwood," the collision could have been avoided.

9. The Court erred in not finding that the master of the "Wildwood" under the general prudential rule should have stopped his engines or have given the danger signal when he first observed the "Eagle" on his port bow some distance away.

10. The Court erred in not finding the master of the "Wildwood" at fault for failure to sound a danger signal and to stop and reverse his engines when danger was first observed.

11. The Court erred in not finding this young man under twenty-one years of age disqualified from acting as master of a registered vessel trading in foreign commerce.

12. The Court erred in not finding that the evident lack of skill and experience of the young man in command of the "Wildwood" was a contributory cause of the collision which occurred.

13. The Court erred in not finding the "Wildwood" at fault upon the admission of her master that if he had been looking over the port bow and watching closely, he might have seen it referring to the "Eagle."

14. The Court erred in not finding the "Wildwood" at fault upon the admission of her master that while alone in the wheel-house charged with

the double duty of steering his vessel and keeping lookout he left the wheel-house, stepped out on deck, went to the companionway and talked with Brindle, who was below decks, the "Wildwood" then being in the danger zone.

15. The Court erred in not finding the "Wildwood" at fault [367] when her master admitted that he did not blow a whistle or sound a signal before the collision.

16. The Court erred in not finding that the "Wildwood" was at fault in not giving one blast of her whistle if her master intended to make a port to port passing when he saw the mast head and side lights of the "Eagle" bearing about six feet from the "Wildwood's" stem on his port bow.

17. The Court erred in holding that the "Wildwood" was not obligated to maintain a proper and efficient lookout, because she had the right of way.

18. The Court erred in not finding that the helmsman in the pilot-house of the "Wildwood" could have seen the "Eagle" approaching during some four minutes prior to the collision when two of the disinterested witnesses from the shore not so advantageously placed saw the "Eagle," heard her exhaust and watched the vessels as they came together.

19. The Court erred in not finding that the "Wildwood" was violating the collision rules in not showing a range-light, and not having her lights burning brightly so they could be seen by the "Eagle."

20. The Court erred in not finding that the "Wildwood's" master should have seen and heard the "Eagle" long before the vessels entered the danger zone and that he was as much at fault as the "Eagle" in not so doing.

21. The Court erred in not finding the owners and master of the "Wildwood" grossly negligent in not taking steps to avoid the collision by changing her course, stopping or reversing her engines, giving the danger signal without regard to the fault of the "Eagle," for it clearly appears from the shore witnesses that the "Eagle" was in the "sheen of the moon," and could have been easily and readily seen for at least a half mile before the vessels entered the danger zone, if the master of the "Wildwood" had been paying attention to his duties. [368]

22. The Court erred in finding that the failure of the "Eagle" to have and maintain proper lights was the proximate cause of the collision, for the "Eagle" could have been readily seen without lights by the "Wildwood's" master, if he had been paying attention to his duty, or if Brindle, who was below deck had been keeping lookout as required by law and the collision rules.

23. The Court erred in awarding damages for injury to the hull in any greater sum than its value which was found to be \$350.00.

24. The Court erred in not finding that the "Wildwood" was not worth repairing and in not estimating the damage at the value of the hull immediately before the collision.

25. The Court erred in allowing as damages a sum greater for cost of repairs than the value of the hull.

26. The Court erred in fixing the damage to the hull in any sum greater than \$350.00 and in failing to divide the same between libellant and claimant.

27. The Court erred in not dividing the cargo loss between the parties.

28. The Court erred in awarding any sum for loss of batteries, electrical equipment and supplies.

29. The Court erred in applying the rule of $\frac{2}{3}$ rds off new for old.

30. The Court erred in allowing any sum for reconditioning the engine.

31. The Court erred in allowing \$240.00, or any other sum, as demurrage for the loss of the use of the "Wildwood."

32. The Court erred in finding a total damage in any sum in excess of \$700.00, and in not dividing this amount; that is to say the Court erred in entering any decree against the claimant [369] herein in excess of \$350.00 for the reason that no damage in excess of \$700.00 could be properly awarded, and this sum with costs of suit should have been divided upon the ground of mutual fault.

33. The Court erred in making specific Findings of Fact and Conclusions of Law over the objections and exceptions of the claimant.

34. The Court erred in not sustaining the exceptions and objections taken at the trial in the admission and rejection of testimony which ex-

ceptions and objections are noted and preserved in the bill of exceptions.

35. The Court erred in entering findings numbered one and two over the objection and exception of claimant, for the reason preserved and noted in the exceptions taken and allowed at the time of entry of said findings and decree.

36. The Court erred in entering the Conclusions of Law noted in the allowed exception thereto.

37. The Court erred in entering final decree over the noted exceptions of claimant.

WINTER S. MARTIN,

Proctor for Claimant and Respondent.

Filed in the District Court, District of Alaska, First Division. Aug. 25, 1922. John H. Dunn, Clerk. By M. D. Morrissey, Deputy. [370]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 375 pages of typewritten matter, numbered from one to 375, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of proctor for claimant and appellant on file in my office and

made a part hereof, in Cause No. 493-KA, wherein Mary L. Brindle, Executrix of the Estate of Alexander Brindle, deceased, is libellant and appellee and gas power boat "Eagle," her engine, tackle, apparel and furniture, S. L. Selig, claimant, is appellant.

I further certify that the said record is by virtue of a notice of appeal and citation issued in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to the sum of One Hundred Seventy 25/100 (\$170.25) Dollars has been paid to me by claimant and appellant.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 6th day of October, 1922.

[Seal]

JOHN H. DUNN,
Clerk.

[Endorsed]: No. 3935. United States Circuit Court of Appeals for the Ninth Circuit. S. L. Selig, as Claimant of the Gas Power Boat "Eagle," Her Engine, Apparel, Tackle and Furniture, and J. R. Heckman, Stipulator, Appellants, vs. Mary L. Brindle, as Executrix of the Estate of Alexander Brindle, Deceased, Appellee. Apostles on Appeal.

Upon Appeal from the United States District Court
for the Territory of Alaska, Division No. 1.

Filed October 23, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

At a stated term, to wit, the October term, A. D.
1922, of the United States Circuit Court of
Appeals for the Ninth Circuit, held in the
courtroom thereof, in the City and County of
San Francisco, in the State of California, on
Monday, the twentieth day of November, in
the year of our Lord one thousand nine hun-
dred and twenty-two. Present: The Honor-
able WILLIAM B. GILBERT, Senior Circuit
Judge, Presiding; The Honorable WILLIAM
H. HUNT, Circuit Judge; The Honorable
CHARLES E. WOLVERTON, District Judge.

No. 3935.

S. L. SELIG, as Claimant of the Gas Power Boat
"EAGLE," Her Engine, Tackle, Apparel
and Furniture,

Appellant,

vs.

MARY L. BRINDLE, as Executrix of the Estate
of ALEXANDER BRINDLE, Deceased,
Appellee.

Order Permitting the Amendment of Notice of Appeal, Appeal Bond and Appellate Record to Include J. R. Heckman as Coappellant.

This case coming on to be heard upon the motion of the appellant, Steve L. Selig, and J. R. Heckman for an order permitting the amendment of motion of appeal, appeal bond and the appellate record generally in the above-entitled cause, to include as coappellant therein J. R. Heckman, surety in the stipulation to abide the decree filed in the Clerk's office at Ketchikan, when action was first instituted against the gas power boat "Eagle," wherein and whereby the "Eagle" was released and discharged, and the bond substituted therefor;

And it appearing to the Court that J. R. Heckman is a necessary and proper party appellant in said cause and that his name was omitted from the notice of appeal and other appellate papers by inadvertence, and it appearing further that said J. R. Heckman has waived the issuance and service of citation and notice of appeal, and has entered his appearance in the above-entitled cause, and that the parties appellants, Steve L. Selig, and J. R. Heckman will jointly execute a new appeal and supersedeas bond in the same amount as the one now on file in said cause in the same amount and with the same covenants and conditions therein, for the security of the appellee, and the Court being duly advised as to the propriety thereof,—

IT IS BY THE COURT ORDERED AND DECREED that the notice of appeal, appeal bond, and all of the papers in the appellate record may be and hereby are amended so as to include the name of J. R. Heckman as additional appellant. Said cause to hereinafter proceed and to be styled as "Steve L. Selig, Claimant, and J. R. Heckman, Stipulator, Appellants, vs. Mary L. Brindle, Executrix Libelant Appellee."

IT IS FURTHER ORDERED that said appellants be and they hereby are permitted to file a new and substitute appeal bond in their joint names as coappellants with the same condition as to amount and surety as in the original appeal and supersedeas bond, and when so filed said original and supersedeas bond shall be vacated and exonerated and the new and substituted bond shall be thereafter effected as an appeal and supersedeas bond in said cause upon the joint appeal of said Selig and Heckman.

IT IS FURTHER ORDERED AND DECREED that no further or additional notice of appeal or citation shall be necessary in said cause, it appearing to the Court that said J. R. Heckman waives notice and citation.

In the United States Circuit Court of Appeals
Ninth Circuit.

IN ADMIRALTY—No. 3935.

S. L. SELIG, as Claimant of the Gas Power Boat
“EAGLE,” Her Engine, Apparel, Tackle
and Furniture, and J. R. HECKMAN, Stipu-
lator,

Appellants,

vs.

MARY L. BRINDLE, as Executrix of the Estate
of ALEXANDER BRINDLE, Deceased,
Appellee.

**Stipulation Omitting Parts of Record for Printing
Purposes.**

The parties hereto by virtue of the provisions of subdivision 8, General Rule 23, of the above-entitled court, stipulate and agree that the Clerk of this court in the above-entitled cause shall not be required and he is requested not to print the following described portions of the record in his custody, to wit:

1. All of the title of the court, cause and caption on all papers after the statement of the case made by the Clerk of the District Court found at page one of this record.
2. Original libel, pages 2 to 5, inclusive.
3. Stipulation for costs, page 6.
4. Attachment and monition, pages 7 and 8.
5. Claim of owner, page 9.

6. Intervenor's stipulation for costs and expenses, page 10.
7. Stipulation, pages 11 and 12.
8. Mr. Cosgrove's order of release to the marshal, page 13.
9. Appearance of Winter S. Martin, page 14.
10. Claim of owner, page 15.
11. Exceptions to libel at pages 16 and 17.
12. Claimant's interrogatories numbered 7, 8 and 9, at page 19.
13. Answers to interrogatories 7, 8 and 9, at pages 21 and 22.
14. All that part of answer to interrogatory No. 13 at page 23 of the record, as follows: lines 20 to 30 inclusive, and lines 32 to 37 inclusive.
(N. B.—The Clerk will please not omit line 31, to wit: "Overhauling the engine and new bronze shaft, \$200.)
15. Minute order, hearing exceptions to libel, page 25.
16. Stipulation and order, page 30.
17. Affidavit for substitution of libellant, page 39.
18. The following parts of transcript of the evidence or bill of exceptions, commencing at page 71 of this record, as follows, to wit:
All that part on the pages hereinafter mentioned which is bracketed and initialed "W. S. M." and "R. W. J.," viz: On pages 71, 72, 74, 75, 76, 77, 83, 84, 89, 90, 91, 92, 93, 94, 95, 96, 98, 100, 101, 102, 107, 108, 114, 117, 120, 121, 122, 124, 125, 127, 128, 130, 131, 132,

140, 141, 155, 158, 161, 162, 163, 164, 165,
174, 176, 177, 178, 179, 180, 196, 201, 202,
203, 208, 209, 210, 211, 214, 215, 216, 217,
218, 219, 225, 226, 229, 230, 231, 232, 233,
237, 241, 242, 243, 245, 250, 251, 252, 253,
254, 255, 256, 269, 273, 287, 281, 290, 291,
293, 294, 295, 297, 298, 299, 300, 303, 305,
308, 309, 312, 313, 319, 324, 326, 327, 349,
350, 351, 353, 354.

19. Citation on appeal, pages 371 and 372.

20. Praecipe designating contents of appellate record, pages 373, 374, and 375.

In stipulating that the above parts of the record need not be printed it is agreed that none of the foregoing parts are material or necessary for the consideration of any question that is before the Court.

The parties hereby agree to, and do accept the findings of the District Court upon the following items only of the damage, as assessed by the lower court, viz.: \$294.30, cargo loss; \$222.50, supplies and material.

IN WITNESS WHEREOF the parties have hereinafter set their hands this 22d day of November, 1922.

WINTER S. MARTIN,

Proctor for Appellants.

ROBERT W. JENNINGS,

Proctor for Appellee.

[Endorsed]: In Admiralty—No. 3935. In the United States Circuit Court of Appeals, Ninth Circuit. S. L. Selig, as Claimant of the Gas Power

Boat "Eagle," Her Engine, Apparel, Tackle, and Furniture, and J. R. Heckman, Stipulator, Appellants, vs. Mary L. Brindle, as Executrix of the Estate of Alexander Brindle, Deceased, Appellee. Filed Nov. 22, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals,
Ninth Circuit.

IN ADMIRALTY—No. 3935.

S. L. SELIG, as Claimant of the Gas Power Boat,
"EAGLE," Her Engine, Apparel, Tackle and
Furniture, and J. R. HECKMAN, Stipulator,
Appellants,

vs.

MARY L. BRINDLE, as Executrix of the Estate
of ALEXANDER BRINDLE, Deceased,
Appellee.

**Appellants' Statement of Errors upon which They
Intend to Rely, Together With Parts of the
Record Which They Deem Necessary to Print
Pursuant to Subdivision 8 of Rule 23.**

To the Honorable Judges of the Above-entitled
Court:

The appellants herewith file with the Clerk of the above-entitled court a statement of the errors upon which they intend to rely in the above cause, together with the parts of the appellate record which they deem necessary for the consideration

thereof under and by virtue of Subdivision 8 of General Rule 23 of this court, viz.:

Appellants will rely wholly and entirely upon those assigned errors which relate to and touch the question of liability in the above-entitled cause and they will not present in this court any claim or error based upon the amount or extent of damages awarded by the District Court, reserving, however, the right at all times in this appeal to have the liability and the damages in said cause divided upon the ground of mutual fault; that is to say, that appellants will waive any of the assignments of error in said cause touching the amount or extent of the damages assessed and awarded by the trial court, to wit:

\$1050.00 awarded by the District Court for the cost of repairs.

294.30 cargo loss.

222.50 property loss, consisting of supplies and equipment.

200.00 for re-conditioning the gasoline engine.

240.00 for loss of profits, making a total of

\$2006.80, which is the amount awarded by the District Court.

POINTS AND ERRORS UPON WHICH APPELLANTS WILL RELY.

Appellants reserve for determination on this appeal all questions arising under Assignments of Error 1 to 22, inclusive.

All other assignments are hereby waived except as to the question of divided liability, to wit:

23 to 27, inclusive, in so far as they question the amount or extent of the damages found by the District Court to have been sustained by reason of the collision, expressly reserving, however, throughout all of said assignments the right to have the said damages divided under the admiralty rule of damages, upon the ground of mutual fault and negligence.

PARTS OF THE RECORD WHICH THE APPELLANTS DEEM NECESSARY TO PRINT.

Appellant having waived, in the foregoing statement of errors upon which they intend to rely, all questions touching the amount or extent of the several items of damage awarded by the trial court, except the right to a division thereof, and having heretofore by stipulation filed this day agreed to eliminate certain immaterial parts of the record as unnecessary to a consideration of this appeal, now further designate to the Clerk certain portions of the record which appellants deem unnecessary to a consideration of the questions reserved upon this appeal; that is to say, the appellants deem it unnecessary to print the following parts of the record in the above-entitled cause in addition to those already eliminated by stipulation, to wit:

DEPOSITIONS TAKEN UPON INTERROGATORIES:

1. Interrogatories propounded by claimant to libellant, pages 18, 19 and 20.

2. Answers to interrogatories propounded by claimant to libellant, pages 21, 22, 23 and 24.
 3. Stipulation to take the testimony of H. M. Sawyer upon direct and cross-interrogatories, page 41.
 4. Direct interrogatories propounded to H. M. Sawyer, pages 42 and 43.
 5. Answers to direct interrogatories propounded to H. M. Sawyer, page 44.
 6. Cross-interrogatories propounded to H. M. Sawyer, page 45.
 7. Answers to cross-interrogatories by H. M. Sawyer, page 46.
 8. Certificate of Arthur E. Carr, Notary, page 47.
 9. Stipulation to take testimony of R. P. Walsh on direct and cross-interrogatories, page 48.
 10. Direct interrogatories to R. P. Walsh, pages 49 and 50.
 11. Answers to direct interrogatories by R. P. Walsh, page 51.
 12. Cross-interrogatories to R. P. Walsh, pages 52 and 53.
 13. Notarial certificate of Arthur E. Carr, page 54.
- LIBELLANT'S TESTIMONY, viz:
14. All of the testimony of Alexander Brindle, commencing at page 71 and continuing to and including page 84.
 15. All of the testimony of Alexander Brindle, commencing at page 200 and continuing to and including page 203.
 16. All of the testimony of Alexander Brindle, commencing at page 229 to and including page 231.

17. All of the testimony of A. J. Inman, commencing at page 85 and continuing to and including the first twelve lines of page 105.
(N. B. The Clerk will please be careful to include the recross-examination of Mr. Martin commencing in the middle of page 105 and continuing throughout page 105 to page 108, inclusive, except as the initialed parts have been eliminated by stipulation. That part is preserved for the sole purpose of showing the Court where the "Wildwood" was struck by the "Eagle" and explaining the direction of the blow and the place of the injury.)
18. All of the testimony of A. J. Inman, commencing at page 226 and continuing to and including page 228.
19. All of the testimony of George Thompson, commencing at page 109 and continuing to and including page 121.
20. All that portion of the testimony of Harold A. Brindle commencing at page 164 to and including the first nine lines of page 171; also that portion of Harold A. Brindle's testimony commencing at line eight, page 176, to and including line twenty-five, page 176; also all that portion of Harold A. Brindle's testimony commencing at line thirteen, page 177, continuing to and including line thirteen of page 191.
21. All of the testimony of Alexander Winterburn Brindle commencing at page 195 and continuing to and including page 199.

CLAIMANT'S TESTIMONY, viz:

22. All of the testimony of Carrington C. Keesling commencing at page 234 and continuing to and including page 252.
23. All that additional part of Carrington C. Keesling's testimony at pages 350 and 351.
24. All of the testimony of Joseph F. Radenbaugh commencing at page 257 and continuing to and including page 269.
25. All of the testimony of James Rasmussen, commencing at page 270 and continuing to and including page 278.
26. All of the testimony of Alexander Brindle commencing at page 279 and continuing to and including page 281.
27. All of the testimony of Patrick Hamilton commencing at page 306, and continuing to and including page 308.

Except as to the parts of the record deleted by mutual agreement in the written stipulation filed by the parties hereto in said cause, the Clerk of the above-entitled court will please print all of the typewritten and certified appellate record in the above cause, except the parts hereinabove specifically deleted and eliminated, to the end that (1) under the stipulation above mentioned certain immaterial and irrelevant parts of the record shall be omitted, and (2) only those parts of the record shall be printed by the Clerk under subdivision 8 of Rule 23 of this Court as are necessary to a proper deter-

mination of the questions reserved by this statement of errors upon which appellants intend to rely.

The questions of liability and division of damages do not call for or require the printing of any of the parts of the record specifically designated herein to be omitted.

Dated at San Francisco, California, this 22d day of November, 1922.

WINTER S. MARTIN,

Attorney for Appellants.

Service of the foregoing statement of errors upon which appellants intend to rely, together with a designation to the Clerk of parts of record to be printed acknowledged this 22d day of November, 1922, at San Francisco, Calif.

ROBERT W. JENNINGS,

Proctor for Appellee.

[Endorsed]: In Admiralty—No. 3935. In the United States Court of Appeals, Ninth Circuit. S. L. Selig, as Claimant of the Gas Power Boat "Eagle," her Engine, Apparel, Tackle and Furniture, and J. R. Heckman, Stipulator, Appellants, vs. Mary L. Brindle, as Executrix of the Estate of Alexander Brindle, Deceased, Appellee. Filed Nov. 22, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals,
Ninth Circuit.

IN ADMIRALTY—No. 3935.

S. L. SELIG, as Claimant of the Gas Power Boat
“EAGLE,” Her Engine, Apparel, Tackle and
Furniture, and J. R. HECKMAN, Stipulator,
Appellants,

vs.

MARY L. BRINDLE, as Executrix of the Estate of
ALEXANDER BRINDLE, Deceased,
Appellee.

Designation by Appellee for Printing Record.

To the Clerk of the Above-entitled Court:

The appellee requests you to have printed the *entire* record on file with you in above-entitled cause, *except* the following mentioned portions, viz.

(1) All those portions mentioned in stipulation signed by proctors for the parties and filed with you herein on November 22d, 1922, as being portions agreed not to be printed.

- (2) (1) Stipulation to take the testimony of H. M. Sawyer upon direct and cross-interrogatories, page 41.
- (2) Direct interrogatories propounded to H. M. Sawyer, pages 42 and 43.
- (3) Answers to direct interrogatories propounded to H. M. Sawyer, page 44.
- (4) Cross-interrogatories propounded to H. M. Sawyer, page 45.

- (5) Answers to cross-interrogatories by H. M. Sawyer, page 46.
- (6) Certificate of Arthur E. Carr, Notary, page 47.
- (7) Stipulation to take testimony of R. P. Walsh on direct and cross interrogatories, page 48.
- (8) Direct interrogatories to R. P. Walsh, pages 49 and 50.
- (9) Answers to direct interrogatories by R. P. Walsh, page 51.
- (10) Cross-interrogatories to R. P. Walsh, pages 52 and 53.
- (11) Notarial certificate of Arthur E. Carr, page 54.
- (12) All of the testimony of Alexander Brindle, commencing at page 200 and continuing to and including page 203.
- (13) All of the testimony of Alexander Brindle, commencing at page 229 to and including page 231.
- (14) All that portion of the testimony of Harold A. Brindle commencing at page 164 to and including the first nine lines of page 171; also that portion of Harold A. Brindle's testimony commencing at line eight, page 176, to and including line twenty-five, page 176; also all that portion of Harold A. Brindle's testimony commencing at line thirteen, page 177, continuing to and including line thirteen, of page 191.

- (15) All of the testimony of Alexander Winterburn Brindle commencing at page 195 and continuing to and including page 199.

This designation is made in accordance with Section 8 of Rule 23 and is made because we desire to contend for an increased allowance for repairs to the hull and also for interest on all allowances made, besides contending that *all* the damage shall be borne by appellant (claimant).

Dated at San Francisco, November 27, 1922.

CHAS. H. COSGROVE,

ROBERT W. JENNINGS,

Proctors for Appellee (Libellant).

[Endorsed]: No. 3935. United States Circuit Court of Appeals for the Ninth Circuit. S. L. Selig, as Claimant, etc., Appellants, vs. Mary L. Brindle, as Executrix, etc., Appellee. Designation of Appellee Under Subdivision 8 of Rule 23. Filed Nov. 27, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals,
Ninth Circuit.

IN ADMIRALTY—No. 3935.

S. L. SELIG et al.,

Appellants,

vs.

MARY L. BRINDLE, Executrix,

Appellee.

Additional Designation by Appellee for Printing Record.

In my "Designation by Appellee for Printing Record" filed with you on November 27, 1922, I inadvertently omitted to direct the printing of the following enumerated lines of Harold A. Brindle's testimony, to wit:

The last twelve lines on page 164, the first eight lines on page 165, and the last six lines on page 165. You will please have those lines printed.

This, of course, modifies sub-section (14) of 2 in my said former designation.

Dated at San Francisco, November 29, 1922.

ROBERT W. JENNINGS,
Proctor for Appellee.

[Endorsed]: No. 3935. United States Circuit Court of Appeals for the Ninth Circuit. S. L. Selig et al., Appellants, vs. Mary L. Brindle, etc., Appellee. Additional Designation by Appellee Under Sub. 8 of Rule 23. Filed Nov. 29, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit 9

No. 3935

S. L. SELIG, AS CLAIMANT OF THE GAS
POWER BOAT "EAGLE," HER ENGINE,
APPAREL, TACKLE AND FURNITURE, AND
J. R. HECKKMAN, STIPULATOR,
APPELLANTS

VS.

MARY L. BRINDLE, AS EXECUTRIX OF
THE ESTATE OF ALEXANDER BRINDLE,
DECEASED, APPELLEE

APPELLANTS' BRIEF

WINTER S. MARTIN
PROCTOR FOR APPELLANTS

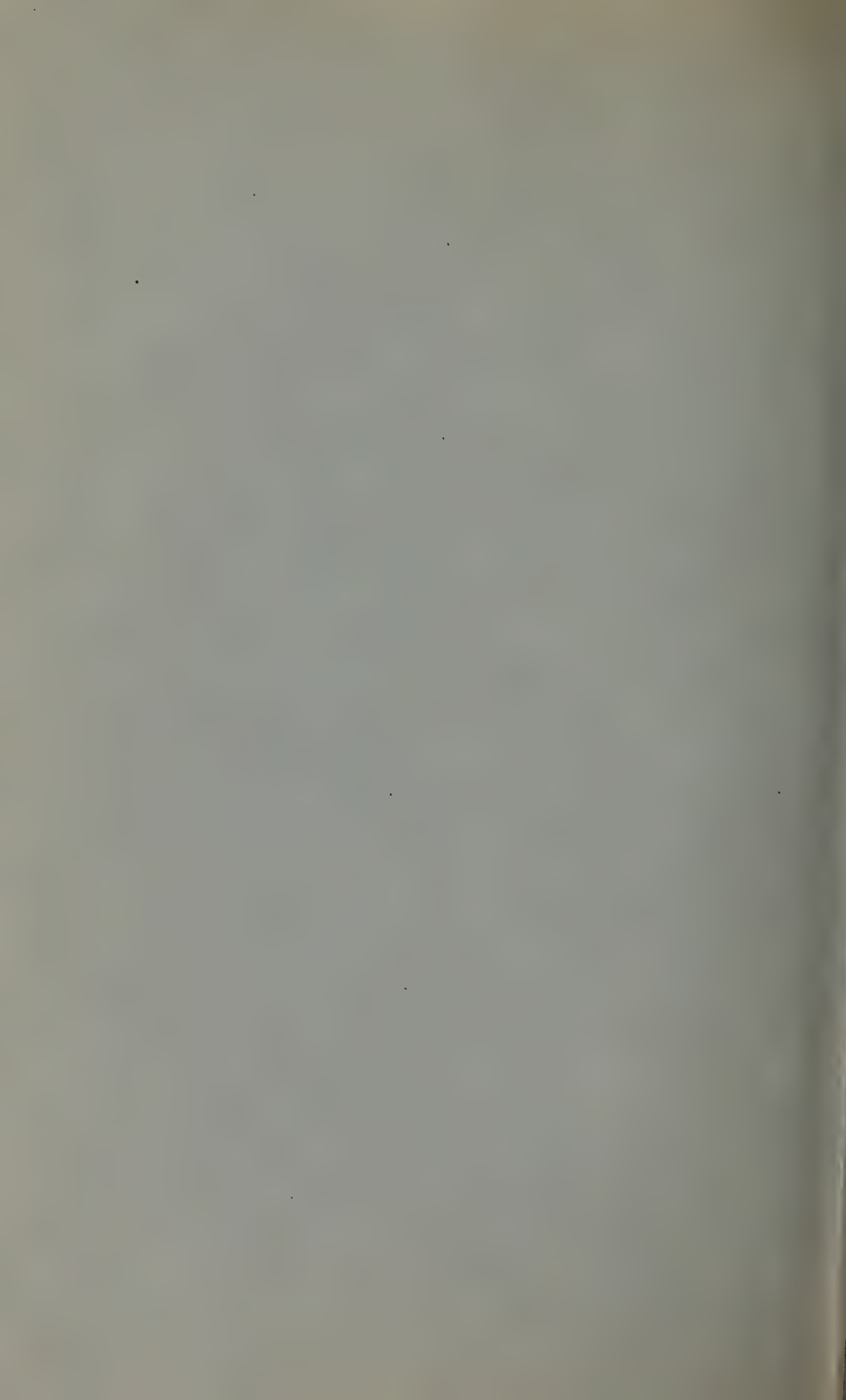
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F. D. MONKTON,

CLERK



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**United States Circuit Court
of Appeals**
For the Ninth Circuit

S. L. SELIG, AS CLAIMANT OF THE GAS
POWER BOAT "EAGLE," HER ENGINE,
APPAREL, TACKLE AND FURNITURE, AND
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APPELLANTS

VS.

MARY L. BRINDLE, AS EXECUTRIX OF
THE ESTATE OF ALEXANDER BRINDLE,
DECEASED, APPELLEE

APPELLANTS' BRIEF

The libel was filed in the District Court of Alaska at Ketchikan by Alexander Brindle, owner of the gas boat "Wildwood," against the gas boat "Eagle" to recover damages resulting from a collision between the two vessels on the evening of July 23,

1921, in Revillagigedo Channel off Mary Island Light, Alaska. Before final decree Alexander Brindle died and his widow was substituted as libellant.

The libel charged that the collision was caused solely and wholly by the fault and negligence of the "Eagle's" master and crew. Appellants in their answer alleged that the "Wildwood" was wholly to blame but after the proof had been submitted abandoned this contention and sought to establish mutual fault. The cause was heard upon oral evidence. There were two depositions touching loss of profits which are not necessary to a determination of this appeal, appellants having filed a statement with the clerk under subdivision eight of rule twenty-three designating parts of the record for printing purposes. See pages 300 to 306 of the apostles.

The district court found the "Eagle" wholly at fault and awarded damages to appellee as follows: (a) \$1050.00 for repairs to the hull, (b) \$294.30 cargo loss, (c) \$222.50 batteries and equipment, (d) \$200.00 reconditioning engine, (e) \$240.00 loss of future profits the equivalent of demurrage, making a total award of \$2,006.80.

In appellants' designation the clerk was directed to print only the parts pertaining to the questions of navigation and the division of damages upon the ground of mutual fault, expressly deleting those portions pertaining to the amount or allowance of damages. Appellee, however, designated certain additional parts touching a part of the damage award,—see page 307 of the record and a further designation at page 310.

Apparently it is appellee's intention to limit the discussion of damages to the one item of repairs to the hull, viz: (a) \$1050.00. The language of appellee's designation at page 309 of the record is:

“This designation is * * * made because we desire to contend for an increased allowance for repairs to the hull and also for interest on all allowances made besides contending that all the damage shall be borne by appellant (claimant).”

In addition to the parts of the record deleted by our respective designations to the clerk, proctors for each of the parties stipulated that certain immaterial matter should be deleted and omitted from the printed record—see page 297 of the record, viz:

“In stipulating that the above parts of the record need not be printed, it is agreed that none of the foregoing parts are material or necessary for the

consideration of any question that is before the court. The parties hereby agree to and do accept the findings of the district court upon the following items only of the damage as assessed by the lower court, viz, \$294.30 cargo loss, \$222.50 supplies and material."

The items of \$200.00 for the engine and \$240 for loss of profits however have been eliminated by the respective record designations.



STATEMENT OF THE CASE

The "Wildwood" is a gas boat of thirteen tons net, forty-five feet overall which was built in the year 1906. At the time of the collision she was being operated by two boys, one of whom was the son of the owner. The other Leo F. Ryan by name, was acting as master although he was not then twenty years of age. These two made the entire crew. On the 23rd of July, 1921, the "Wildwood" came into collision with the "Eagle" off Mary Island in Revillagegido Channel. The testimony is conflicting as to the distance the vessels were from the island when the collision occurred. Mr. Selig testified that the vessels came together about a mile

off the island. (Selig 239.) Ryan, master of the "Wildwood," made a statement in his collision report to the customs at Ketchikan that the collision occurred one mile off Mary Island light. (Ryan 153.) The distance off Mary Island is only important in determining the weight to be given to the testimony of the lightkeeper, Kinyon and wife. The "Wildwood" was southbound from Ketchikan, Alaska, to Prince Rupert, B. C., laden with fresh fish, the cargo consisting of several varieties of salmon.

The "Eagle" is a gas boat of twenty-seven net tons, sixty-three feet long. She was owned and operated by Steve Selig, as master. At the time of the collision she was enroute from Prince Rupert, light, bound north ~~from~~^{to} Ketchikan. Captain Selig had two men with him, Ames and Olander. These men were in the pilot house of the "Eagle" for some time before the vessels collided. Ames was steering and Olander was keeping lookout. Captain Selig left the pilot house and went below a short time before they came together.

The collision occurred a little south of Mary Island light. The vessels approached each other at about seven miles per hour upon meeting head on courses, the "Wildwood" travelling about southeast,

while the "Eagle" was proceeding toward Ketchikan on a northwest course. These courses are approximate.

The "Eagle" struck the "Wildwood" on the port quarter five or six feet from the stern, tearing through several planks and otherwise inflicting such injuries that she would have sunk, but for the aid and timely assistance of Captain Selig and his men.

It happened about twenty minutes after ten during fine weather in the summer time upon a clear moon-light night. The sea was calm and smooth. The moon rose in the northeast, coming up from behind the mountains on the mainland across the channel. It was nearly a full moon and was probably twenty degrees above the horizon at the time the vessels came together. The "Eagle" would have the moon on her starboard hand about abeam.

She was heading toward Point Alava, which is at the southerly end of Revillagegido Island, and about five miles north of the place of collision. The southern part of the island at Point Alava and the mainland opposite Mary Island are high and mountainous. The channel is about four miles wide. These high lands in the east and north, when the

sea is calm, present a dark background to vessels travelling northward, according to Captain Selig. The light-keeper's wife denied this, but the government chart in evidence shows the location and height of the mountains. Our general knowledge of light and shadows lends weight to Captain Selig's contention on this point. He testified that heading toward Point Alava the high lands in the east and north and the calm sea blended together in a dark mass, making it impossible to distinguish any object on the water against the black background.

The moon cast its rays westerly across the channel and lighted up the waters to the eastward and southward. There is a wide stretch of open sea south of Mary Island, where the channel widens out and reaches into the great open bay or arm of the ocean, called "Dixon's Entrance." To persons looking southward from Mary Island, these open waters extend as far as the eye can see. No land lies to the southward and southeastward except at a great distance, and there is no dark background of high land. The light-keeper and his wife readily saw the "Eagle" out in the channel to the southward in the "sheen" of the moon, while Ames at the "Eagle's" wheel did not see the oncoming "Wild-

wood" until she was about sixty feet distant. The appellants' failure to see the "Wildwood" is explained by the "Eagle's" crew, who say the "Wildwood" was travelling southward without lights. That the "Wildwood" saw the "Eagle" some distance away appears from the allegations of the libel, viz: part of the third article:

"When at the point above described the master of the 'Wildwood' observed a dark object off the port bow some distance away. The said object at first was taken for either a log or a shadow. As the object approached, and when about some sixty feet distant, it was discovered that it was a boat, and afterwards ascertained to be the gas power boat 'Eagle'."

The boy, Ryan, in charge of the "Wildwood" testified in answer to a question whether he could see the "Eagle" some distance away, that:

"If I had been looking over my port bow and watching closely, I might have seen it."

The light-keeper and wife saw the "Eagle" as she was travelling northward, at least four minutes before the "Eagle" flashed her lights on. During this time the "Eagle" travelled at least a half mile upon her course northward and the "Wildwood" travelled about the same distance southward. The

proof supported by the physical facts clearly shows that the "Eagle" stood out in bas-relief in the moonlight against the open horizon directly in the course of the "Wildwood" about dead ahead or slightly on her port bow, and could have been readily seen and avoided by the crew of the "Wildwood" if they had been attending to their duties. The proof further shows that Harold Brindle of the "Wildwood's" crew, at the time of the collision and for a long time before was below decks in his berth. That Ryan, master of the "Wildwood" was the only person on deck for a long time before the vessels collided. That he was doing double duty, serving as wheelsman and lookout at the same time. That a short time before the collision occurred, while the vessels were in the danger zone approaching each other, he (Ryan, master) left the wheel house, leaving the wheel without anyone to guide or hold it, and leaving the wheel house without lookout or pilot, stepped out on deck, went to the companion-way and stepped down below and talked with Brindle who was in his bunk about what course he, Ryan, (master and pilot) should take from Mary Island light, the "Wildwood" being then abreast of the light. It further appears that the "Wildwood" gave no signal of her approach. In view of the

allegations of the libel and the admissions of Ryan, master of the "Wildwood," we deem it proper in the opening statement to call attention to the obvious failure of the "Wildwood" to properly navigate and observe the rules of the road while in a position of danger from collision.

The "Wildwood's" crew contend they are without fault and that the collision was caused solely by the "Eagle," who ran her down while travelling north without lights. The claimants contend that the "Wildwood" was not observable against the dark background, that she was without adequate or sufficient lights, and that the "Wildwood's" light was not seen until she was about sixty feet from the "Eagle." When the vessels collided, Captain Selig rushed on deck and with help from Brindle and Ryan put lines on the "Wildwood" to keep her from sinking. After they had lashed her safely to the "Eagle," the latter towed the "Wildwood" to Ketchikan, where she was beached. Here the "Wildwood" remained indefinitely notwithstanding the claim of the libellant that she was a very valuable vessel, and was earning large dividends. As the only question pertaining to the damage award is confined to repairs, it will not be necessary to consider the loss of the "Wildwood's" earnings during

the period she would have been out of commission undergoing repairs. She was not repaired, but on the contrary was allowed to lie on her bilge on the tide-flats where she remained until and during the trial in the district court. As the repairs were never made, it was entirely a matter of estimating the cost of repair by expert builders. There was overwhelming evidence that she she was not worth repairing, the cost of repairs being greater than the value of the vessel. The "Eagle" was uninjured. No question is raised as to loss of cargo, supplies, batteries, profits, etc. This appeal presents the question of sole or mutual fault, and the allowance of \$1050.00 for repairs to the hull. We understand appellee will ask for an interest allowance.



SPECIFICATIONS OF ERROR

The error lay in finding the "Eagle" solely at fault. The proof shows a clear case of mutual fault. The assignments in one form or another raise the question whether the trial court was justified in placing the sole responsibility for the collision upon the "Eagle." See apostles, pages 287 to 292, inclusive—assignments one to twenty-seven.

ARGUMENT

THE COMPARATIVE FAULT OF THE COLLIDING VESSELS

Before discussing the conduct of the two boys in charge of the "Wildwood" we have this to say of the master and crew of the "Eagle," viz: that of the two vessels the crew of the "Eagle" were in our judgment less culpable than that of the "Wildwood." Let us compare their several acts of omission and commission.

First, respecting the lookouts. Each vessel was at fault in not having a man on lookout stationed in the bow of the vessel. Of the two, the "Eagle" is in a better position. She had the benefit of two men in the pilot house. This cannot be controverted. The "Wildwood" had one man, viz: Leo F. Ryan, a boy not then twenty years of age. Ryan had a very limited experience. Al. Ames of the "Eagle" had three or four years' experience in gas boats and not three or four days' as said by the court in the opinion. For the court's statement in the opinion, see page 26 and Ames' statement under oath at page 207:

“Q. What has been your experience as a boatman, gas boat man, before the night of the collision?

“A. Oh, I worked on a few different boats.

“Q. How long approximately?

“A. Oh, I guess probably *three or four years* all put together.”

The “Wildwood” was in the exclusive control and management of a young, inexperienced boy. Alone in the pilot house for at least an hour before the collision, he did double service, acting as lookout and steering at the same time. In addition to this glaring fault, viz: the failure to have a lookout other than himself, which in view of what happened was a very strong contributing cause, this young lad left the pilot house a very short time before the vessels came together, and crossing the deck went below leaving the pilot house and deck without anyone in command while the two vessels were entering the danger zone. See the statement of Harold Brindle, pages 124, 128, and particularly at page 129, as follows:

“Q. (To Brindle) You don’t know as a matter of fact what course you were actually steering do you?

"A. Well, I know when he came down, I got out of my bunk and looked over and I could see just where it was."

Mr. Cosgrove at page 138 said to Ryan:

"Q. Just go ahead and tell what happened.

"A. Well, about six or seven minutes before we got to Mary Island light, *I went down* and hollered to Harold—he asked me to call him when we got to Mary Island—and I also asked him the course from Mary Island to Tree Point. He was down there where he had a light handy, and I didn't want to light the light in the pilot-house to look it up in the little log book. He gave me the course and I went back and put her on the course he give me and was holding her on that course, when all of a sudden I thought I seen a shadow ahead and just then the lights of a boat flashed on, headed straight at me on the port bow. I seen the head-light and the two side lights of the boat. I seen them all at the same time."

And again at page 275, Ryan when questioned by the writer, answered as follows:

"Q. But to communicate with anyone below as you did with Mr. Brindle on the night in question, it was necessary for you to leave the pilot-house and go down to speak to him?

"A. Yes, sir.

"Q. And you did that?

"A. Yes.

"Q. Was there anyone in the pilot-house during the time that you were off from the pilot-house speaking to Mr. Brindle?

"A. There was not.

"Q. You and Mr. Brindle were the only men on board?

"A. Yes.

"Q. (By MR. COSGROVE) How long did that take you?

"A. It didn't take me more than about twenty or thirty seconds."

Ryan admitted that if he had been keeping a careful lookout he would quite likely have seen the "Eagle." See the following by Mr. Martin on cross-examination (pp. 146, 147):

"A. (By RYAN) It was nearly a full moon.

"Q. Was it a clear night?

"A. It was a clear night.

"Q. Sea was calm?

"A. The sea was calm.

"Q. And nearly a full moon. If you had been alert and had been looking, you would have seen the hull of the 'Wildwood,' or rather the hull of the 'Eagle' some distance away, wouldn't you, a half a mile away or a mile?

“A. I don’t know as I would, because when I was looking out at night I expected to see lights, if there was a boat in the distance.

“Q. Yes, but with a moon, now, nearly full and half way up on the horizon, clear night, not obscured, you could see the outline of the ‘Eagle’ on the water some distance away, couldn’t you?

“A. *If I had been looking over my port bow and watching closely I might have seen it.*”

THE PHYSICAL FACTS TEND TO ESTABLISH THE “WILDWOOD’S” FAULT

The physical facts demonstrate quite conclusively the gross carelessness of this young man Ryan, and the testimony of the light-keeper and wife establishes beyond peradventure the fault of the “Wildwood.” Upon a calm moonlight night the horizon line where sea meets sky is very clear. It presents a light, silver colored background upon which passing ships stand out in bas-relief with conspicuous clarity. This presents a familiar picture to one looking seaward on a bright moonlight night. Passing ships are so clearly visible upon the horizon under the moon’s rays that it is difficult for one to see the ship’s lights, the dark hull appearing so

vividly in the moonlight as to overshadow and destroy the artificial light rays. This was the condition of sea and sky looking southward from the place opposite Mary Island light where the "Wildwood" is known to have been during the few minutes before the collision.

There were no highlands in the south and east. There was a wide expanse of open water. The chart introduced in evidence proves this statement. The "Wildwood" heading southeast had a clear unobstructed view of this moonlit horizon and surface of the waters. What the light-keeper and wife saw casually from a less favorable viewpoint, the pilot and master of the "Wildwood" should have seen, bearing in mind by way of contrast that the light-keeper and wife were not particularly interested in the approach of the "Eagle," while the pilot and master of the "Wildwood" serving in the double capacity of wheelsman and lookout was especially charged under the law and in the special circumstances with maintaining an unusually vigilant lookout. Captain Ryan could have seen the approaching "Eagle" for at least five minutes before the vessels collided. The light-keeper and wife heard the "Eagle's" exhaust and Mr. Kinyon picked

her up with his glass. His wife saw the 'Eagle' as a moving object upon the waters before the lights were turned on. (See Apostles, page 100) :

"A. Yes, I could discern an object barely with my naked eye, a dark object.

"Q. Even before you saw the lights turned on?

"A. Yes.

"Q. You just saw a dark object?

"A. I could see this dark object moving.

"Q. Then you watched them come together?

"A. Yes."

Mr. and Mrs. Kinyon contend that the collision took place about 700 feet from Mary Island. (p. 121.) Ryan at the trial said it occurred between 500 and 1000 feet off Mary Island, although in his collision report to the customs he said it took place a mile off the light. (See page 153.) Mr. Kinyon, light-keeper, fixes the distance at from 500 to 800 feet. (See page 116.)

If Mrs. Kinyon could see the "Eagle" from her place of observation on shore, as a dark moving object out on the waters before her with her naked eye before the "Eagle's" lights were flashed on, how much more readily and easily Ryan could have seen

the "Eagle" from his near-by and rapidly approaching "Wildwood," if he had been keeping a vigilant lookout—in fact one might say—if he had been looking at all.

Ryan not only kept no lookout himself, but he had no one else to perform this service. He was away from the wheel and pilot-house for some time, during which the "Wildwood" was running wild without a directing hand. Ryan says he was not away more than thirty seconds. This at best was mere guesswork. It is more probable that this irresponsible, inexperienced youth spent a minute or more below decks in finding out his course from Brindle. By his own estimate of thirty seconds, his vessel would travel three hundred and thirty feet.

He saw the "Eagle" when she was from 100 to 125 feet away, and yet gave no whistle blast, notwithstanding he observed her coming head-on. The fact that he saw all three lights—her red and green side-lights, and her mast head light, furnishes a complete refutation to any contention that the "Eagle" was a vessel crossing ahead when her lights were flashed on. Meeting in this situation he was obligated under the collision rules to give one whistle blast. It is this conduct on the part of the

“Wildwood’s” master, which we say is grossly negligent in comparison with what was done on board the “Eagle,” assuming that her master and crew were not free from fault.

We, therefore, say with some confidence that the trial court was clearly wrong in condemning the “Eagle” with such severity in view of the much more serious neglect and grave violation of all rules of navigation by the two nineteen-year-old boys in command of the “Wildwood.”

THE “EAGLE” WAS NOT A CROSSING VESSEL

They were meeting vessels under article 18 of the “Inland Rules”—i. e., vessels meeting end on or nearly so.

The master and crew of the “Eagle,” according to the light-keeper and wife, did not turn on the “Eagle’s” lights, until the vessels were within a very short distance of each other. They say two seconds in time, but this is, of course, only guesswork. They could not see the distance between the vessels because of darkness and the elapsed time from the moment Mrs. Kinyon observed the dark

object, to the turning on of the lights and the impact of collision, must, of course, rest entirely on conjecture. Mrs. Kinyon did not see the mast-head and both side lights of the "Eagle," until the impact occurred. Note the following testimony by Mrs. Kinyon (page 109):

"Q. (By MR. COSGROVE): Could you see those lights at the time she struck?

"A. I could at the time she struck."

And again at page 116:

"Q. You observed three lights?

"A. Yes. Not at the instant she flashed them on, but two seconds after, I observed them.

"Q. Two seconds after?

"A. Yes.

"Q. What light did you see when she first came up?

"A. The side light and masthead light.

"Q. Yes, what was the color of the side light?

"A. Red light. (p. 117.)

"Q. When they were flashed on do you recall that you saw all three?

"A. Not at the moment that they were flashed on—I wouldn't be certain. But at the moment of the collision, I saw all three lights." (Apostles, p. 122.)

Mrs. Kinyon saw the "Eagle" heading on her course as a shore observer on her port side. She saw the "Eagle's" red light. The "Eagle" was pursuing a course nearly parallel with the island. She would not have exposed her green light on this course to a shore observer off on her port side. She could not have done so, unless she had changed her course four or five compass points to port. Mrs. Kinyon admits she did not see the "Eagle's" three lights until the impact took place. This is entirely consistent with Ryan's statement that he first saw all three lights of the "Eagle." Note his testimony, Apostles, page 138:

"Q. (Direct examination by Mr. Cosgrove): Just go ahead and tell what happened.

"A. * * * he gave me the course and I went back and put her on the course he give me, and was holding her on that course, when all of a sudden I thought I seen a shadow ahead and just then the lights of a boat flashed on headed straight at me on the port bow. *I seen the headlight and the two side lights of the boat. I seen them all at the same time*, and I promptly swung the helm to port which put the boat to starboard, and she rammed us right there."

On cross-examination Ryan testified (p. 149):

"A. I would say, then, port quarter on the bow.

It was about six feet back from the bow on the port side, right over there and I seen her.

“Q. Where did she hit?

“A. She hit eight feet from the stern.

“Q. Yes—but now, keeping in mind the line of your keel—

“THE COURT (interrupting): He answered that question by saying it was about six feet from the stem of the boat on the port bow, that is when he first saw her.

“MR. MARTIN: That, your honor, would not be very definite—six feet.

“Q. Do you mean at an angle, or measured about six feet right at the bow of your vessel?

“A. Well, looking from the middle of the boat, straight above the keel looking at the front window it would be about six feet from the stem on the port side.”

And at page 150 of Apostles—cross-examination of Ryan continued:

“Q. When the lights were flashed on, you saw all three lights—you say?

“A. Three lights on the gas boat ‘Eagle.’

“Q. That is, you saw the green light and the red light and the white masthead light, white masthead light?

“A. Yes, the white masthead light.”

From these statements it is clear the the "Eagle" was running northwesterly up the channel on a course, which would take her well clear of Mary Island light—or upon a course nearly parallel with the island. In this position Mrs. Kinyon would naturally see the port-light of the "Eagle," and Ryan, looking ahead, would see in front of him all three lights of the "Eagle." If she had been pursuing any other course, her lights would not have shown in the manner indicated by these two witnesses. If the "Eagle" had been any distance on the "Wildwood's" port bow, heading directly toward him, Mrs. Kinyon would have observed both side lights and the masthead light of the "Eagle." The trial court was clearly wrong in holding that the "Eagle" was a crossing vessel under the star-board hand rule, and that by reason of this position the "Wildwood" had the right of way. If she was holding a course which would make her a crossing vessel, the "Eagle" would have exposed both side lights to the light-keeper and wife. She would have been heading directly for the island toward them head-on, thereby crossing the "Wildwood's" course, which lay parallel to the island—the general trend of the island shore being northwesterly and south-

easterly. Mrs. Kinyon is careful to say she saw only the "Eagle's" red light until the collision occurred, at which time she saw both of her side lights.

Again if the "Eagle" had been a crossing vessel, showing both side lights, she must have been coming toward the "Wildwood" at right angles, and far enough aft on the "Wildwood" to strike her amidships, if the "Wildwood" had stopped suddenly. In this position with 125 feet clearance, collision was not possible. In no other position would the "Eagle" show both side-lights, unless she was nearly in line meeting end on. In any position on an angle between the "Wildwood's" bow and beam on the port side, where there was danger of collision, the "Eagle" would present only her green light to the view of a person on the "Wildwood's" deck. If she were on the "Wildwood's" port bow to any extent and in a crossing position involving danger of collision she would not have exposed both side lights. In this position as a crossing vessel burdened under the right of way rule, she would have exposed both side lights to Mrs. Kinyon, and only her green light to Ryan. Whereas the witnesses give the opposite version, viz: Ryan saw all three lights, while Mrs. Kinyon saw only the masthead and red side light.

The natural position and course of the "Eagle" verify these statements, for the "Eagle" had no occasion to steer any course other than one northwesterly parallel with the island. This testimony of Leo Ryan and Mrs. Kinyon establishes the position of the "Eagle" the moment the lights were flashed on, whatever the distance between the vessels may have been. In other words this testimony shows clearly that the vessels were meeting end on, and that the "Eagle" was not a crossing vessel.

Mrs. Kinyon's statement that she saw both side lights of the "Eagle," when the collision occurred does change the situation. It is explained by what was done by the vessel just before they came together. Ryan ported his helm and swung to starboard,—Ames on the "Eagle" reversed his engines and ported his helm. Whether he ported or not is immaterial in considering this matter of lights. The "Eagle's" engines in reverse had about stopped her progress through the water. This cannot be denied for if she had been going ahead full speed she would have cut the "Wildwood" in two. Captain Selig and Al. Ames both testify to reversing the "Eagle's" engines and the blow struck corroborates them. With the "Eagle" nearly stopped and still

reversing, the "Wildwood" going ahead at her regular speed of seven miles per hour under full port helm, would naturally swing the "Eagle" around with her. This would turn the "Eagle's" prow toward the land. When the "Eagle" commenced to gather sternway under port helm she would swing still more rapidly toward the land. The "Eagle" in reverse under port helm would tend to increase the swinging movement which the "Wildwood" set in motion when the vessels met. Nor can we be sure that the Kinyons saw the "Eagle's" side lights. They may have seen the "Wildwood's" lights, for the latter also turned rapidly to starboard toward the land. This, however, does not affect the position of the vessels before the collision as indicated by the lights of the "Eagle," as observed by the Kinyons and by Ryan.

THE "WILDWOOD" DID NOT HAVE THE RIGHT OF WAY

The trial court is in error when it holds in the opinion that:

"The right of way was with the 'Wildwood.' The approaching vessel was off the port bow apparently head-on." (Pages 31 and 32 Apostles.)

The position of the vessels, as indicated by the witnesses, shows they were meeting end on or nearly so, when they were first observed by each other, and by the shore witnesses. The position of the blow and its direction ranging wedge fashion from forward aft show that they nearly cleared each other. This proposition clearly understood, viz: that these vessels were meeting end on, it follows that the "Wildwood" should have given one blast of her whistle. This she failed to do. (See page 272.) And this is important, because of what the trial court found as to what was done by the "Eagle," when the "Wildwood" was first observed, viz: see the opinion, Apostles 30 and 31:

"I am, therefore, satisfied from the testimony that the 'Eagle' did not port her helm and turn to starboard as testified by Ames, but that she either kept on her course, or turned to port or inshore toward Mary Island as testified to by Ryan and by Mr. and Mrs. Kinyon. If the 'Eagle' had turned to starboard, she would have cleared the 'Wildwood,' or at least have struck her only a glancing blow.
* * * I can, therefore, come to no other conclusion than that the proximate cause of the collision was the negligence of the 'Eagle,' first in travelling after nightfall without lights, and second in not turning to starboard on discovery of the 'Wildwood'."

THE "WILDWOOD'S" FAILURE TO WHISTLE

In view of this finding, the necessity for giving one blast of the "Wildwood's" whistle is apparent. If the libellant's contention that the "Eagle" starboarded and cut into the "Wildwood" is true, and the court so found, then the failure to give one whistle blast is vital to the case. Can an admiralty court say that when vessels meet end on or nearly so and one of them fails to give one blast of her whistle, as required by article 18 of the Inland Rules, that she can be considered free of fault, when if she had given one blast, she might have aided the other vessel in determining what to do?

According to Al. Ames of the "Eagle," he saw a single dim white light. He saw no side lights at all. In this situation a blast from her whistle would have announced a port to port passing. Ames, of course, claims he ported his helm and swung to starboard. If he did so, then he was not guilty of one of the acts of omission which the court found caused the collision. If he did not port his helm, but kept a straight course or starboarded, swinging to the left into direct contact with the "Wildwood,"

then the "Wildwood" cannot complain for she failed to sound the warning intended for just such situations. And the court cannot say that the failure to sound the whistle was an act in extremis. You cannot estimate distance well at night, but assuming that the vessels were 125 feet away and traveling toward each other at about eleven feet per second, which would be their rate of speed at about seven miles per hour, there would be sufficient time to pull a bell-cord on the "Wildwood." The court's erroneous finding rests largely upon the theory that the "Eagle" was a crossing vessel burdened with the "Wildwood's" right of way, and that the "Wildwood" was not obligated to blow her whistle. Ryan saw the dark outline of the "Eagle" some distance away before the vessels got to within 125 feet of each other, and yet gave no signal.

THE FURTHER NEGLIGENCE OF THE "WILDWOOD"— THE AGE AND INEXPERIENCE OF THE MASTER

Leo F. Ryan, master of the "Wildwood," was not yet twenty years old. He was grossly incompetent. In fact Harold Brindle from his position below decks appears to have given Ryan the necessary

instructions as to course and distance. His experience was limited. He gave the following testimony:

"Q. What has been your experience with gas boats?

"A. Well, I worked around for J. L. Smiley at Charcoal Point and I worked on other boats, a day or two here and a day or two there. I worked on the 'Wildwood' previous two months, and I was on several small gas boats."

He testified that he took out a master's certificate for the "Wildwood" in February, 1921; that he had never been master of any other vessel. He was asked:

"Q. How long had you served on gas boats before going on as master of the 'Wildwood'?

"A. Probably six months on different boats.

"Q. Boats as large as the 'Wildwood'?

"A. Smaller boats than the 'Wildwood'."

He had served on little boats 32 or 33 feet long. He had no experience on large gas boats and he joined the "Wildwood" twelve days before the collision occurred. (See his cross-examination, pages 141 and 142.)

This vessel was registered under the laws of the United States. Her master was required to be a citizen of the United States and a person twenty-one years of age. See Treasury Decisions No. 5087 and also the earlier decision No. 3814.)

The rule of law is that if a master or other officer is not a citizen or not of age or not licensed, the ship will be held at fault if the master's lack of experience generally or lack of skill or judgment in the particular case could have possibly contributed to it. In the *City of Baltimore*, 275 Fed. 490, the court holds that an unlicensed master in charge of a vessel "in flat defiance of the law" (requiring licensed officer) is a fault which is chargeable to a vessel in a collision case and renders her liable.

In the instant case the treasury decisions *supra* hold, following the requirements of the navigation laws, that a vessel of American register or enrollment of five tons or more shall be owned by an American citizen and that her master shall be an American citizen. In construing this statute the attorney general and the department hold that a master of a vessel must be twenty-one years old as a male person does not become a citizen until reaching that age so as to have the right to command an

American vessel. Lack of skill and experience dictate such a conclusion.

One has but to enquire at any of the United States Customs to learn that they will not permit a person under twenty-one years to act as a master of a registered or enrolled vessel of the United States. Their uniform practice in this particular is based on the treasury decisions quoted.

An inexperienced boy, not then twenty years of age was in command of the "Wildwood." His inexperience clearly contributed to the collision for he kept no lookout, left the pilot house at a crucial moment, left his vessel to steer herself, gave no signal, failed to stop, failed to reverse, etc., when he saw the dark object on his port bow.

THE FAILURE OF THE "WILDWOOD" TO KEEP A LOOKOUT

The "Wildwood's" fault clearly appears from the libel. The Wildwood's master "observed a dark object off the part bow some distance away."

Article XXIX of the Inland Collision Rules is as follows:

"Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the

consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

The master of the "Wildwood" was charged under the rules to avoid coming in contact with this dark object observed on the "Wildwood's" port bow. It is said that it was observed some distance away; that it was first thought to be a log or a shadow. The law required the master of the "Wildwood" at that moment to use his night or other marine glasses to ascertain definitely what this object was. If he was still in doubt as to what the dark object was, not seeing any lights or hearing any signal, it was his duty to give a danger signal of four whistle blasts and to stop and reverse his engines. It was his duty under rule XXIX above cited to take such precautions in the circumstances disclosed to him as would avoid peril and probable collision. If it is claimed that he could not see which direction or course the dark object on his port bow was taking it was at least apparent to him that the object was coming toward him and that his vessel was approaching this object. Mrs. Kinyon saw the dark object afterward ascertained to be the "Eagle,"

with her naked eye from her place on shore much farther away than Ryan. It was in these circumstances his duty to stop and give the danger signal or take such other steps by changing his course as would have avoided the collision which followed. Instead, there is no allegation that these things were done, but on the contrary the proof shows clearly that the "Wildwood" continued her course and speed with this dark object rapidly approaching. Her master then states that it was observed to be a gas boat; that the lights on this boat were flashed on when she was one hundred twenty-five feet distant. It is clear that the master of the "Wildwood" was negligent in failing to take the steps which proper navigation required in a situation of that sort.

Captain Ryan was alone in the pilot house for some minutes before the collision occurred, during which time *he was engaged in steering the "Wildwood,"* looking at the compass and keeping the vessel upon her course. During the few minutes before the collision the vessels were coming together upon a course which would bring them in collision almost head-on. He saw the outline of the "Eagle" before her lights were turned on. *He said that if he had been paying attention he could have seen the "Eagle" some distance away.* (See

147.) It was a clear moonlight night. The "Eagle" was in the "sheen" of the moon ahead of him. He could have seen her if he had looked in ample time to have changed his course and avoided the collision. He left the pilot-house and was paying no attention whatever to the navigation of the vessel just at a time when if he had been keeping a careful lookout he would have seen the approaching "Eagle." The "Wildwood" during a brief period was without helmsman or lookout. He gave no danger signal when he first observed the dark object some distance away on his port bow nor did he change his course to avoid it. He failed to give any signal although he saw the outline of the "Eagle" before she turned on her lights, but did nothing notwithstanding his expressed doubt as to the "Eagle's" course or intentions. When from 100 to 125 feet away the "Eagle's" lights were turned on according to his version, yet he did nothing to prevent collision either by blowing the danger signal or stopping and reversing.

From the master's testimony the "Wildwood" was clearly at fault in:

1. Not keeping a lookout.

2. Not stopping, backing and giving the danger signal when he was in doubt about the dark object on the port bow.

3. Not giving one blast of his whistle if he intended to make a port to port passing when he saw the masthead and side lights of the "Eagle" bearing about six feet from his stem on his port bow.

4. In leaving the pilot-house for a number of seconds during which time his vessel was without lookout or helmsman, and was moving forward throughout the water at ten or eleven feet per second toward the "Eagle" upon head on courses.

THE LEGAL EFFECT OF FAILURE TO KEEP A LOOKOUT

Small gas boats are not exempted from the operation of the collision rules. This question was recently decided by this court in the case of *Mylroie v. British Columbia Mills Tug and Barge Company*, 268 Fed. 449 at 455. It was contended that there was a custom for small tugs not to maintain any lookout stationed forward. The captain and pilot were in the pilot-house and stated that they

were keeping lookout. There was also a man in the pilot-house engaged in steering the vessel. This court said:

“But, regardless of the question of the preponderance of evidence on the point, we think it clear that custom counts for nothing as against the law. See authorities *supra*, and *The Catharine v. Dickinson et al.*, 17 How. 170, 177 (15 L. Ed. 233), where the supreme court, referring to the evidence given to prove such a custom, said:

“‘However, this may be in the daytime, we think that such custom or usage cannot be permitted as an excuse for dispensing with a proper lookout while navigating in the night, especially on waters frequented by other vessels. Under such circumstances, a competent lookout, stationed upon a quarter of the vessel affording the best opportunity to see at a distance those meeting her, is indispensable to safe navigation, and the neglect is chargeable as a fault in the navigation.’

“But even if it be conceded that a man stationed in the pilot house of the tug, charged with the duty of keeping a lookout, would answer the requirements, the evidence in the case clearly shows, in our opinion, that neither of the men in the pilot house of this tug during the time in question constituted such a lookout; for one of the men was the helmsman, whose duty it was to watch the compass and steer the vessel under orders given him, and the other two were Capts. Johnson and Bjerre, who,

when both were present, were part of the time examining the chart and engaged in conversation; it further appearing that at the time the dangerous situation was discovered and for a considerable period immediately preceding, Capt. Johnson was not in the pilot house, but in some other part of the vessel. It cannot be properly held that before Capt. Bjerre, who was at the time directing the movement of the tug, saw the waves breaking upon the island, and suddenly, without any warning to the tow, ordered the wheel put hard over, thereby breaking the tow's shackle, and resulting in its being grounded, a lookout properly stationed would not have seen and reported the island ahead in ample time to have afforded the tug an opportunity to make a safe turn with the tow following."

This rule was approved in *The Tillicum*, 217 Fed. 976 at 978, decided by Judge Neterer in 1914. It was a case where a lookout was not maintained. She was a tug 87 feet long. It was contended that by custom, lookout in the pilot house was sufficient.

"It is immaterial what the custom in the operation of boats is if the custom is contrary to the law. If a custom could obtain over the law, navigators could very readily overcome an act of congress.
* * * Such cannot be the law."

We have cited the general precaution rule, to-wit: article 29, for the reason that the failure to keep a lookout is one of the faults which this rule seeks

to guard against. That all moving vessels shall maintain a careful and efficient lookout is an elementary rule of navigation and good seamanship. Vessels are held to a strict performance of this duty.

This court, speaking through Judge Morrow, said in *Wilder S. S. Co. v. Low*, 112 Fed. 161:

“The officer in charge of the steamer *Claudine* at the time of the collision in question did not slacken her speed, stop, or reverse the engines when the uncertainty of the barkentine’s identity and direction became apparent to him. In fact, his actions at that time, from his own testimony, reflect grave doubts upon his ability to command a steamer under such circumstances.

“For an officer to leave his vessel entirely without a lookout especially when another vessel is known to be in the vicinity, is culpable negligence, *and approaches very nearly the line of reckless navigation*. The importance of the lookout and the high degree of vigilance required of the person occupying that position on a vessel, is clearly stated by the United States Supreme Court in *The Ariadne*, 13 Wall. 475, 478, 20 L. Ed. 542, 543, as follows:

“The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment’s negligence on his part may involve the loss of his vessel, with all the property and the lives of all on board. The same consequence may ensue to the vessel with which

his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. * * * It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. *Every doubt as to the performance of the duty, and the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.'*

“No deviation from this statement has been made by the supreme court in later cases (*The Oregon*, 158 U. S. 186, 193, 39 L. Ed. 943), and it is therefore as binding today as when first made.”

The courts say that the rule as to lookouts requires him to be placed near the bow of the ship, and that it isn't sufficient for a lookout to be maintained in the pilot-house. If a man had been stationed at the “Wildwood's” bow attending to his duties as lookout a collision would have been avoided.

Of lookouts properly stationed, the supreme court in *The Ottawa*, 3 Wall. 269, 272, says:

“They must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty. Proper lookouts are competent persons *other than the master and helmsman*, properly stationed for

that purpose, on the forward part of the vessel; and the pilot house in the night time, especially if it is very dark, and the view is obstructed, is not the proper place.

“Lookouts (says the supreme court) are valueless unless they are properly stationed, and vigilantly employed in the performance of their duty; and if they are not, and in consequence of their neglect the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel, and will render her liable, unless the other vessel was guilty of violating the rules of navigation.”

The Colorado, 91 U. S. 692, 699.

To the same effect see also:

The Pilot Boy, 115 Fed. 873.

The Komuk, 125 Fed. 841.

The Violetta, 141 Fed. 690.

The Fannie Hayden, 137 Fed. 280.

The Tillicum, 217 Fed. 976.

The leading United States Supreme Court case is that of *The Ariadne*, 13 Wall. 475-479, 20 L. Ed. 542.

This case was approved in *Argo S. S. Co. v. Buffalo S. S. Co.*, 223 Fed. 586, holding both vessels in fault for failure to keep a lookout; *The Cypromene*,

135 Fed 565, holding steamer navigating river at night without a lookout liable; The Sitka, 132 Fed. 864, holding steamer liable for collision with passing vessel where she had no efficient lookout.

THE FAILURE TO GIVE A DANGER SIGNAL IF IN
DOUBT AND THE FAILURE TO GIVE THE MEET-
ING END ON SIGNAL UNDER RULE 19 CON-
TRIBUTED TO THE COLLISION WHICH FOLLOWED

Ryan, master of the "Wildwood," says that when the "Eagle" flashed on her lights she was then in a line about six feet from his stem—that he saw in this position both side lights and masthead light of the "Eagle." In these circumstances she could not have been a crossing vessel. If, however, it is claimed that the "Eagle" was a crossing vessel, the failure to give one blast of the whistle under the pilot rules, and the failure to stop and blow the danger signal if the maneuvers of the "Eagle" were not understood, is likewise a clear fault on the part of the "Wildwood."

Article XVIII, Inland Rules—is as follows:

"If when steam vessels are approaching each other, either vessel fails to understand the course or

intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts not less than four of the steam-whistle."

This signal is commonly called the Danger Signal. The purpose of the signal is to notify or give warning to the approaching vessel that her course, and intention are not understood.

The rule (Danger Signal, Rule III, Art. 18, Inland Rules), requires that the signal shall be given, immediately doubt arises as to the course or intention of the approaching vessel.

The *Acilia*, 120 Fed. 455.

Straits of Dover, 120 Fed. 900.

The *Straits of Dover* being the privileged vessel as was the "*Wildwood*," if the court can possibly hold the "*Eagle*" to be a crossing vessel instead of a vessel meeting end on or nearly so, was held at fault for failure to sound the danger signal because it was or should have been apparent to her that the "*Bluefields*" was persisting in a wrong course involving danger of collision. See:

The *Robert Dollar*, 160 Fed. 876.

The *Virginian*, 238 Fed. 156.

The *Admiral Watson*, 266 Fed. 122.

That there was danger of collision whether the "Eagle" be regarded as a crossing vessel under rule 19 or a meeting end on vessel under rule 18 is apparent from the fact that the vessels collided. This fact establishes the danger of collision. As said by the supreme court in the case of *The Carroll*, 8 Wall. 302:

"The fact that the vessels did collide explodes the theory that there was no risk of collision."

If when the "Wildwood's" master first observed the "Eagle" as a log or shadow off on his port bow he could not tell which way it was moving or what it was, and if when he saw the outline of the "Eagle" in the darkness before her lights were turned on, he was in doubt he should have stopped his engines and have sounded the danger signal.

THE FAILURE OF "WILDWOOD" TO SHOW A RANGE LIGHT

The "Wildwood" was running without a range light. The light-keeper and his wife testified that they observed one white light on the "Wildwood" after she passed in front of their house. They say

this was her masthead light. By the Inland Rules and by the Motor Boat Law, motor boats of upwards of 40 feet (and the "Wildwood" was forty-five feet according to the testimony), must carry a range light visible all around the horizon. The light-keeper and his wife testified that they observed the white light of the "Wildwood" after they had lost her ~~red~~^{green} light. They are clearly mistaken in this because if they saw a masthead light on the "Wildwood" they must of necessity have lost it at the instant when they lost the ~~red~~^{green} light, for the masthead light and the ~~red~~^{green} side light are required to show from the bow around to two points abaft the beam on the port side of the vessel. When one disappeared the other must likewise have disappeared. If the light-keeper and his wife saw a white light after losing the ~~red~~^{green}, it was clearly the light of the "Eagle" and not that of the "Wildwood." It could not be the "Wildwood's" range light because they saw but one white light all the time that they observed the "Wildwood's" port light as she passed before them south-bound. They speak of seeing but one light and clearly would have seen two lights if the "Wildwood" had been carrying a range light. This range light is singularly enough missing with a very apt explanation that it was lost; but the testimony dis-

closes that it was not burning—otherwise it would have been seen.

If the range light had been shown on the “Wildwood” it would have given the “Eagle” further aid in avoiding her. Captain Selig testified that the “Wildwood” had only one light. This was the mast-head light, which he and Ames say was smoked up, and very dim.

The Titon, 23 Fed. 413.

THE FAULT OF THE “EAGLE” WAS LESS IN COMPARISON

We should have contended that it was the sole fault of the “Wildwood” but for the testimony of the lightkeeper and wife as to when the lights of the “Eagle” were flashed on. According to Mr. Selig, owner of the “Eagle,” and her helmsman, the lights were flashed on when it commenced to get dark, some time before ten o’clock, and that these lights were lighted and burning for at least a half hour before the collision occurred. The testimony of the light-keeper and wife is that the “Eagle’s” lights were flashed on a few seconds before the collision.

Possibly Capt. Selig turned the wrong switch when he went below at ten o'clock, and thought his lights were burning. If he is mistaken and was running without lights when there was danger of collision, he was at fault. This was not the sole or proximate cause of the collision by any means. The "Eagle" was in the "sheen of the moon" clearly observable some distance off on the port bow without lights. Captain Ryan saw her and was not misled by the failure to carry lights. Mrs. Kinyon saw her with her naked eye before the "Eagle's" lights were flashed on. His fault was as great even if the "Eagle" had never shown lights. Lights are primarily used to make visible that which would be otherwise invisible. That this failure on the part of appellants was not much of a factor in the situation is clear by Ryan's testimony, who says that he observed the "Eagle" at least 125 feet away; that he saw her before her lights were flashed on; and that if he had been paying attention he could have seen her for a much longer distance before her lights were turned on. In other words, the failure to maintain lights on the part of the "Eagle" had very little to do with the collision which followed. The "Eagle's" engines were reversed immediately when the masthead light of the "Wildwood" was

observed. Her helm was put hard aport and she immediately responded swinging to starboard. That she did the right thing is evidenced by the blow struck. The "Wildwood" did not stop, reverse or whistle, and she was without lookout in the danger zone.

THE "WILDWOOD" MUST SHOW THAT HER VIOLATIONS OF THE COLLISION RULES COULD NOT HAVE CONTRIBUTED TO THE RESULT BEFORE SHE CAN ESCAPE RESPONSIBILITY FOR MUTUAL FAULT AND A DIVIDED LIABILITY

These collision rules are found in an act of congress. Violation of a statute is negligence in itself. We see no reason why the reasoning of the court in the *Pennsylvania* (U. S. Supreme Court), 19 Wall. 125, 22 L. Ed. 148, should not apply. There the court said:

"The liability for damage is upon the ship or ships whose fault causes the injury; but when, as in this case a ship at the time of collision is in actual violation of a statutory rule intended to prevent collisions it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause of the disaster. In such a case

the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, *but that it could not have been.*"

This rule applies where a proper lookout is not provided:

The Geo. W. Childs, 67 Fed. 272.

McCabe v. Old Dom. S. S. Co., 31 Fed. 234.

The Lyndhurst, 92 Fed. 681.

The Beaver, 197 Fed. 866.

The Welburt L. Smith, 217 Fed. 984.

The instant case is not unlike "The Manitoba," 122 U. S. 97, 30 L. Ed. 1095, where the court observed that:

"If the requisite precautions had been observed by both or by either of said vessels, the collision in the opinion of the court would not have happened."

The difference between "The Manitoba" case and that of "The Bluejacket," 144 U. S. 371, 36 L. Ed. 469, cited by the trial court to sustain its position denying mutual fault is readily noted at page 294. The case is clearly distinguished in our favor. "The Manitoba" ruling is clearly applicable to this case, while "The Bluejacket" decision is as clearly in-

applicable. The supreme court said in "The Blue-jacket" case, *supra*, that:

"The difference between the case of *The Manitoba* and the present case involves the vital point, that, in the former, the question was between two steam vessels, while the latter, it is between a steam vessel and a sailing vessel. In the case of *The Manitoba*, the courses of the two steam vessels were not such as to make it the duty of the one more than of the other to avoid the other, or to make it the duty of the one rather than of the other to keep her course; and there was, in regard to the courses of both the steam vessels, such risk of collision that the obligation was upon both to slacken speed, or, if necessary, stop and reverse. But in the present case, the duty was wholly on the ship to keep her course, and wholly on the tug to keep out of the way of the ship; and there was no duty imposed on the tug to stop and reverse, until, as above shown, she was in the very jaws of the collision."

The Circuit Court of Appeals in the Southern District of New York said in *Delaware L. & W. R. R. Co. v. Central R. Co.*, 238 Fed. 560:

"The fundamental rule of the admiralty is that a vigilant lookout must be kept on all vessels, so that collision may be prevented *even with those which are violating the rules.*"

This is emphasized by article 29 of the Inland Rules, applicable to this collision which provides:

“No vessel under any circumstances to neglect proper precautions.

“Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, *or of any neglect to keep a proper lookout*, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

“Who can say that this negligence on the part of the *Roselle* did not contribute to the collision? There is no obligation in navigation that this court is more disposed to enforce *than the duty of keeping a proper lookout.*”

We have underscored the phrase “the duty of keeping a proper lookout” in decisions quoted and in collision Rule 29 to add emphasis to this violation of duty and statute by the “*Wildwood.*”

The *Tillicum*, 217 Fed. 976—Collision—decree against both vessels. Judge Neterer, in holding both vessels at fault quoted from the decision in “The *Arthur M. Palmer*,” 115 Fed. 417:

“If tugs will go about the harbor without lookouts, they may not expect that the court will conjecture nicely what would have happened if the lookout had been in his place, doing his duty, when the collision occurred.”

In "The Tillicum" case, Judge Neterer found both vessels at fault where the lookout was maintained in the pilot house.

The statement of the supreme court in "The Ariadne" should settle any doubts concerning the question of mutual fault. In speaking of the duty of maintaining a look-out, the supreme court said:

"It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty and the effect of nonperformance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

The appellant is, in our judgment, clearly entitled to a division of damages because of the fault of the "Wildwood," which was fully as great if not greater than that of the "Eagle."



DAMAGES

We are in some doubt as to our position before this court upon the question of damages reserved for consideration by counsel for appellee. By our designation and statement of errors to the clerk, upon which we intend to rely in this court, pursuant to subdivision 8 of General Rule 23, the questions upon this appeal, are limited to matters pertaining to faulty navigation, all questions of damages being eliminated. We deem it proper to say at this point that, after carefully examining the rules, we came to the conclusion that rule 3 and section 3 of rule 4 of the Admiralty Rules for the Ninth Circuit upon appeal are not inconsistent, nor are they out of harmony with subdivision eight of General Rule 23 of this court, the underlying purpose apparently being to save expense and unnecessary labor on the part of court and counsel, where the parties can stipulate to narrow the scope of the appeal, or by designation and statement of errors, upon which they intend to rely, accomplish the same purpose. Where, however, the appel-

lee is not willing to accept this designation, the question naturally arises, is the appellant concluded by his designation from discussing all the questions remaining in the record in his opening brief, or may he with propriety discuss the damage question raised by appellee as a part of his case because of appellee's inclusion of matter, which would otherwise be left out, or should appellant wait until appellee states her position upon the matter contained in her designation?

We see no impropriety, however, in making a general statement of our position upon the question of damages specially reserved by the appellee, who will undoubtedly take the position that the damage award of \$1050.00 for repairs upon the hull was inadequate and insufficient, in view of the testimony in the case, which he has caused to be printed under his designation. We should not have been content to accept this finding of the trial court, were it not for the fact that the amount in dispute did not in our opinion justify a presentation of the question, because of the expense of printing the record and briefs. The trial court awarded \$200.00 for re-conditioning the engine. This item was accepted by appellant notwithstanding it appeared from the testimony that the "Wildwood"

could have been placed upon the marine ways at Ketchikan upon her arrival. If this had been done, her engine would not have needed re-conditioning at all. If, as claimed by appellee, the shaft was injured, it could have been taken out and straightened with small expense. Appellee, however, instead, permitted the "Wildwood" to remain on the beach in a position where the tide flowed in and out of the hull through the break in the side. The engine was taken down piece-meal and carried to an engine repair shop where it lay at the time of trial. It had not in fact been re-conditioned, the testimony upon re-conditioning being that it would cost \$200.00 to restore the engine to its former good condition. There was no testimony showing what it would cost to straighten the shaft, and appellee was not properly entitled to an allowance of \$200.00, or any other sum for the engine. Nevertheless we accepted this item of damage. This when added to the sum of \$1050.00, gave the appellee a restored hull and engine. We likewise accepted the items allowed by the court for loss of supplies, cargo and demurrage, or loss of profits. The appellee, therefore, had in addition to her demurrage, cargo and equipment loss, an allowance

of \$1250.00 for the hull and engine to restore the vessel to its former condition.

There was substantial testimony in the record that the "Wildwood" was not worth more than \$1,000.00 fully equipped at the time of the collision. If this testimony is to be relied upon, the damage award leaves the appellee with her engine, together with \$200.00 to restore it to its former condition and \$1050.00 for repairs upon a hull, which is \$50.00 in excess of what the engine, hull and entire boat equipment was worth. The boat was not worth the cost of repairing and no damages should have been allowed at all in excess of the value of the boat as she stood before the collision. The hull was not worth to exceed \$300 or \$400 at best. Note the testimony of the witnesses in this connection. Each one of the libellant's repair witnesses was forced to admit that the "Wildwood" was not worth repairing. The testimony shows that the "Wildwood" was built in 1906, that her hull was not worth to exceed between \$400 or \$500 before the collision. Alexander Brindle testified that he bought the "Wildwood" four years ago paying \$350.00 for the hull. He did not show wherein he had improved the value

of the hull except to install the engine which cost him from \$1500.00 to \$1800.00, including the cost of installation.

Appellee saved her engine. The court has allowed her \$200.00 to restore it to its former condition, which with our acceptance of the other items of loss, leaves only the item of repairs to the hull. In making this award the court has not only allowed more than the entire vessel was reasonably worth at the time of the collision, but has allowed a greater sum than the repairs were reasonably worth in view of all the testimony. The court in making this award has disregarded entirely the testimony of Keesling, Radenbaugh and Rasmussen, all of whom were independent contractors, who would have done the work for \$600.00 or \$700.00. If this work had been offered on bids or tenders, it would have gone to one of these men rather than to the highest bidder, Inman, or to the Slocum Shipyard Company. Admiralty courts always recognize competitive bidding. All things being equal the lowest bid would be accepted. There was nothing in the testimony, which would show that the bids of these three men at a much lower price should have been rejected, because of their inability to do the work in a workmanlike manner, or to get it out on time. If the

court had rejected this testimony, because these men could not do the work as well or within the time the two others could do it, we might not have cause to complain at the action of the court in fixing the cost of repairs upon the estimate of the two high men. We respectfully submit that a court is not at liberty to disregard testimony of this character in the absence of any showing that these three men could not restore the hull to as good condition as before the collision upon the price submitted. Any award in excess of \$600 or \$700 is excessive in view of this testimony, and was more than the hull was worth even at that figure.

The rule of law applicable to this situation is well stated in "Roscoe on Damages and Marine Collisions" second edition, page 52, as follows:

"When a vessel is so much damaged by a collision that a prudent uninsured owner would not repair her, such vessel must then be considered as a constructive total loss, and her owner is entitled to claim from the wrongdoer the value of the ship as if she had been actually and totally lost (see *ante*, p. 32). This rule is based on the principle of *restitutio in integrum* already fully discussed, because the loss of the value of a ship is the maximum loss which can result from a collision. It is also supported by the principle that the injured party must

minimize his loss so far as is reasonably possible. To take a simple example, if a ship which is only worth at the time of the collision £5000 is so much injured that the cost of repairs will be £6000, it would be obviously unjust to demand from the wrongdoer as damages a sum greater than that which would give the owner of the injured vessel the actual value of his ship at the moment of collision. Hence, adopting a convenient phrase of insurance law, the injured vessel has, under such circumstances, become a constructive total loss, and her owner is to be indemnified, not by the payment to him of the cost of repair, but of the value of his vessel."

The facts in the case of "The Reno," 134 Fed. 555, are not unlike those in the case at bar. The machinery was saved in that case and the award was made on the basis of the value of the hull. The rule is again stated in "Louisville and Cincinnati Packing Company v. United Coal Company, 223 Fed. 300. There the court of appeals said:

"Where the final claim for damages exceeds the value of the vessel at the time of the loss, the claim should be carefully scrutinized and the libellant held bound to show special circumstances to justify any such excess; and that good faith and reasonable prudence and good judgment have been exercised in making the repairs, citing *The Venus*, 17 Fed. 925."

It would be violating all rules of damages in collision cases to allow this man to recover a repair bill on a hull which was fifteen or sixteen years old, which cost him, four years ago, \$350 and which was not worth by all the estimates, the cost of the repairs necessary to restore it to its condition before collision. In these circumstances \$350 with interest should represent the damage to the hull.

In the case of "The Venus," *supra*, Judge Brown held that

"the ordinary rule would not admit of a recovery beyond the amount of a total loss, that is the full value of the vessel at the time it was sunk."

See also "The Sequoia," 132 Fed. 625.

As the appellee has recovered her engine, and has been allowed damages for its restoration, together with her cargo, equipment and demurrage loss, she should not be permitted to recover more than the value of the hull, which was not worth repairing. The testimony is clear that it was not worth to exceed what Alexander Brindle paid for it four years before. The award of \$1050.00 should be reduced accordingly. No interest was claimed at any time in the trial court, and in view of the failure of the appellee to minimize her loss and dam-

age by having the boat seasonably repaired, so that the cost could be accurately determined by the actual repair bill or by accepting damages upon the basis of a constructive total loss, no interest should be awarded.

Respectfully submitted,

WINTER S. MARTIN,

Proctor for Appellants.

No. 3935

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. L. SELIG, as claimant of the Gas Power
Boat "Eagle", her engine, apparel, tackle
and furniture, and J. R. HECKMAN, stipu-
lator,

Appellants,

vs.

MARY L. BRINDLE, as executrix of the estate
of ALEXANDER BRINDLE, deceased,

Appellee.

BRIEF FOR APPELLEE.

CHARLES H. COSGROVE,
Ketchikan, Alaska,

Proctor for Appellee.

ROBERT W. JENNINGS,
San Francisco, California,
Of Counsel.

FILED

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P. D. MONCKTON,
CLERK.

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BRIEF FOR APPELLEE.

Statement of the Case.

The Wildwood was southbound; the Eagle, north-bound. The Eagle rammed the Wildwood, striking her about eight feet from the stern; only the Wildwood was damaged. The libel charged sole liability of the Eagle; the Answer charged sole liability of the Wildwood,—alleging only three faults, to-wit: That the Wildwood (1) failed to exhibit lights, (2) failed to sound a whistle, and (3) attempted to make a port to port passing (Answer, par. V. p. 21.)

The proof showed that the Wildwood displayed all the required lights and that the Eagle displayed none; that the Wildwood did not attempt to make a port to port passing but that the Eagle did so attempt, and that the failure to sound the whistle did not contribute and could not have contributed to cause the collision. The proof showed further that it was not a clear moonlight night, and that Ryan, master and helmsman of the Wildwood, was a licensed and competent master, and that he did not leave the pilot house while the vessels were in the danger zone.

Until the argument in the court below claimant (appellant) gave no intimation of any charge of negligence of the Wildwood except in the three particulars mentioned in the answer;—after the proof had been submitted, however, he abandoned the contention that the Eagle was not at fault and sought, and does now seek, to charge the Wildwood with negligence not alone in the particulars set out in the answer but also in certain other particulars not there set out—seeking thereby to obtain a “division of liability”.

The lower court found the Eagle to be solely at fault, and assessed damages accordingly. Claimant appealed and now contends only for “mutual fault”; appellee contends for sole liability of the Eagle and for an increase of the sum assessed as damages to the hull, and for interest.

Summary of Brief and Argument.

I.

AS TO LIABILITY.

(A) The evidence clearly shows violations of statutory requirements as to displaying lights, as to “porting the helm” and “keeping clear”, and other acts of gross negligence, on the part of the Eagle and her crew; sufficient to account for the collision and directly and immediately causing the collision. Discussed in A, p. 4 et seq. *infra*.

(B) Such showing having been made, the Eagle, if it would escape sole liability, has the burden of establishing contributory negligence of the Wildwood by “equally clear” evidence and any doubts on that score are to be resolved in favor of the Wildwood. Authorities under B and C at p. 13 et seq. *infra*.

(C) The Eagle did not sustain the burden cast upon her, but the Wildwood has sustained every burden which she was called upon to bear. Discussed in C, p. 14 et seq.—authorities, *infra*.

II.

AS TO DAMAGES.

(D) The evidence shows that the amount awarded as damages to the hull should be increased. Interest at 8% per annum from date of collision should be allowed on all sums awarded. Evidence,

discussion and authorities under D at p. 43 et seq. *infra*.

A.

THE EVIDENCE SHOWED CLEARLY THAT THE EAGLE VIOLATED THE STATUTE BY TRAVELLING AT NIGHT, IN THE SHADOWS WITHOUT LIGHTS AND BY NOT COMPLYING WITH THE "PORT HELM" AND "KEEP CLEAR" LAW; AND WAS OTHERWISE GUILTY OF NEGLIGENCE—ALL DIRECTLY AND IMMEDIATELY CAUSING THE COLLISION.

There were *five eye witnesses* of the collision, viz: *Mrs. Kinyon* (wife of the lighthouse keeper,—at the lighthouse at the time), *Mr. Kinyon* (husband of said Mrs. Kinyon—at the lighthouse at the time), *Ryan* (master and helmsman of the *Wildwood*—at the wheel at the time), *Ames* (deckhand and helmsman of the *Eagle*—at the wheel at the time), *Olander* (connected with *Eagle*, capacity not apparent,—in *Eagle's* pilot house at the time). All of these except *Olander* testified in the lower court.

In addition *Selig*, owner and claimant of the *Eagle*, who was below at the time of the collision, gave some testimony as to lights, etc.

The other witnesses in the record gave testimony as to damages only.

MRS. KINYON (87)

This witness testified that she, expecting the mail boat *Carmen* from the north, looked in that direction and distinctly saw to the northerly and easterly of said lighthouse the bright white light of the southbound vessel (*Wildwood*) about one mile dis-

tant (88). "It was what I consider a very good light and I see many of them pass" (101) At first she did not see the green (starboard) light, but on looking again as she entered the lighthouse porch she observed on said vessel "a very green light" (89), and "by the arrangement of the light I knew that it wasn't the Carmen" (89). "I took close observation on account of trying to figure out whether that was the Carmen, you see" (95). She continued to observe this white light and this green light until the vessel passed the lighthouse (91) when she lost the green light (99) but continued to see the white light until the very moment of the collision (91, 99, 101, 106).

At or about the time she first observed this white light she heard the exhaust of another boat coming from a southerly direction (89). "*We looked for the lights of this boat and couldn't see none though we could hear her exhaust distinctly*" (89). "*A few seconds before the collision occurred, the northbound boat flashed on her lights and when she struck the southbound boat I could distinctly see three lights—a red light, a green light and a white light*" on the northbound boat (90). "The southbound boat was the Wildwood, the northbound boat was the Eagle (92). The Wildwood was nearer the (Mary Island) shore than the Eagle (97). The collision occurred in the sheen of the moon (93). The lights on the Eagle were snapped on when the vessels were sixty or one hundred feet apart, possibly (101). "Just momentarily before they struck

the helmsman (of the Eagle) must have directed his course directly toward us" (91). Both vessels turned inshore just before the collision (121). She watched them come together and distinctly heard the crash (101). From the time when the lights flashed on on the Eagle to the time of the collision was "such a short time there was no time for thinking" (102).

MR. KINYON (106)

Mrs. Kinyon is corroborated by her husband, David Oliver Kinyon. Kinyon says that he saw the headlight or mast headlight, but he would not swear that he saw the green light, of the southbound boat as "I paid no particular attention" (108). He picked up the northbound boat (Eagle) about a mile away, with the binoculars, and he watched her for about four minutes (108-9); he saw no lights on her; he "looked for them and didn't see them." "They were not there." "I most assuredly would have seen them if they had been there." "I didn't observe any lights in the port holes." "It was dark" (119). But about two seconds before the collision the Eagle flashed on her lights—he first saw her red light and headlight and then her other side light (116-7). In that two seconds she headed toward the island. She made a sharp turn—"turned hard over and came around quick" (117) "just about as sharp as she could turn" (118) both vessels turned inshore towards Mary Island (123).

RYAN (136)

The testimony of Ryan, Master of the Wildwood, corroborates, as far as it goes, the testimony of the Kinyons.

Ryan says, all the lights of the Wildwood were burning (137 bottom) and that he saw no light ahead but "all of a sudden I thought I seen a shadow ahead and just then the lights of a boat flashed on, headed straight at me on the port bow. I seen the headlights and the two side lights of the boat. I seen them all at the same time and I promptly swung the helm to port which put the boat to starboard; and she rammed us right there." The other boat swung to the Island too (138-9). The lights of the Eagle flashed on not more than three or four seconds before she struck the Wildwood. The Eagle struck the Wildwood about eight feet from the stern on the port side. When the Eagle flashed on her lights she was 100 or 125 feet from the Wildwood—possibly less (139).

It is submitted that this tallies with Mr. Kinyon's testimony to the effect that the first light he saw on the Eagle was her port light (red) (117) and that almost immediately after that he saw both the port and starboard lights of the Eagle; for the Eagle being headed north and Kinyon being to the west he would not at first have seen both lights but after the Eagle swung to the island he would and did see both lights, whereas, the Eagle and Wildwood being nearly head on, Ryan would and did see both lights at one and the same time.

AMES (206)

Witness for claimant: Admits that the Wildwood turned to starboard but says that the Eagle also turned to starboard (222). Says the Eagle had lights and he never saw the Wildwood's lights, except one dim white light.

SELIG (230) claimant:

Although not an eye witness, testifies that he, himself, put on the lights of the Eagle about fifteen minutes before the collision. The collision occurred at about 10:20 p. m. (263). For twenty minutes before the collision the Eagle had been traveling in the shadows and that that was dangerous part of the trip (260-261). Immediately after the collision he noticed that the wheel of the Eagle was hard aport (245).

Whom to believe?

There is, then, the testimony of Selig and Ames against that of Mr. Kinyon, Mrs. Kinyon and Ryan. We think this court cannot be in doubt as to whom to believe. The following considerations suggest themselves:

(a) Selig and Ames are interested while the Kinyons are absolutely disinterested. Selig and Ames did not fare very well on cross-examination while the Kinyons and Ryan were unshaken. The trial judge who heard the witnesses, observed their demeanor, etc., believed the Kinyons and Ryan and disbelieved Selig and Ames, saying: "These wit-

nesses (the Kinyons) gave a clear, detailed and unbiased account and their testimony is entitled to the highest credit" (28).

Selig "doth protest too much", while Ames is weak on direct, uncertain and evasive on cross, and swift to follow the lead on redirect—only to be again discredited on cross.

The calling and experience of the Kinyons qualify them as observers. Mrs. Kinyon was for three and a half years at Destruction Island Lighthouse, one year at Possession Island Light, sixteen months at Tree Point Light, North Island three years, Mary Island one year, and at East Brother Light Station on San Francisco Bay (157). She had a special reason for observing and she kept a "daily diary" in which she entered an account of what happened (137). It is true that on objection of claimant the diary was excluded (137), but it was offered, and the fact that she kept it strengthens her testimony.

(b) Olander, a member of the crew of the Eagle, who was in the pilot house at the time of the collision—the only eye witness on the Eagle, except Ames—, does not testify. Although Selig knew just when this case was coming to trial and saw Olander six or seven weeks before the trial and knew that Olander was the only other person except Ames who was in the pilot house of the Eagle at the time of the collision, yet he took no steps whatever to secure his testimony at the trial in the lower court (253-4) *and the record fails to reveal that he has taken any steps to secure his testimony*

for this hearing, although he has had ample time to do so and although he knew the absence of Olander was a strong point against him. The trial judge said:

“It seems that the testimony of Mr. Olander * * * could have been procured by the claimant, as his whereabouts was known until six weeks prior to the time of the hearing but was not produced at the hearing and his, Olander’s, testimony is entirely lacking although it would have been very material” (26).

Whatever excuse might have been urged for the non-production of Olander’s testimony at the trial in the lower court, there is no excuse for its non-production at this trial. Claimant knows now (if he did not know before) the importance of that testimony,—knows that he could obtain a commission from this court,—and knows that the absence of that testimony did, and must now, weigh heavily against him, and yet he has taken no steps to procure it.

“Where officer or crew of a vessel not sworn there is a strong presumption that their evidence would have been against the vessel.”

The New York, 175 U. S. 187; 44 L. Ed. 126;

The Georgetown, 135 Fed. 855, 859 and cases cited;

The Prudence, 191 Fed. 993, 996.

(c) In the libel Selig swears that the Wildwood attempted to cross the Eagle’s bow (Answer, par. IV, p. 19). He was not an eye witness and must have gotten his information from Ames, and yet he

swore at the trial that Ames told him that the Eagle cut across the Wildwood's bow (248). It is not denied that the Wildwood was nearer the Mary Island shore than was the Eagle nor that the Eagle's course was northerly and the Wildwood's course southerly, nor that the Wildwood turned to starboard, i. e. toward the island. How then could the Eagle by porting her helm cut across the Wildwood's bow? The Eagle could not cut across the Wildwood's bow except by starboarding her helm. If the Eagle had ported her helm it would have taken her away from the island, not toward the island—away from the Wildwood, not toward the Wildwood.

(d) The trial court finding the Eagle solely liable, said:

“I can, therefore, come to no other conclusion than that the proximate cause of the collision was the negligence of the ‘Eagle’, first, in traveling after nightfall without lights, and, second, in not turning to the starboard on discovery of the ‘Wildwood’ ”(31).

(e) Ames intoxicated?

There is evidence that Ames was intoxicated. The Eagle was returning from Prince Rupert, B. C., where prohibition does not obtain; Harold Brindle “noticed that Al. Ames was drunk” (125) (131-2); saw several empty bottles on the bunk back in the pilot house, smelling very strongly of whiskey (125). Ryan says Ames was drunk (140)—saw empty bottles (141) (154); half full whiskey bottle in the

forecastle. Selig offered him a drink (156). This denied by Selig—he says the bottle contained distilled water (272).

(f) The testimony of Ames and Selig, interested and discredited as it is, and further weakened by the non-production of Olander, is entitled to little or no weight as against the disinterested and unshaken testimony of the Kinyons and that of Ryan.

Eagle attempted to cross Wildwood's bow.

Whether the vessels be considered as meeting end on or nearly so, or as crossing, the Wildwood did the right thing and the Eagle did the wrong thing. If they were meeting end on the Eagle should have gone to her starboard. She went, however, to her port. If they were crossing, the Eagle, having the Wildwood on her starboard, must keep out of the way of the Wildwood (Art. 19)—instead of so doing she turned the wrong way—directly toward the Wildwood, and rammed her.

Selig says:

“I said to the boys, ‘Now tell me how this happened—see!’ And the boys just told me how the boat was and they placed her off the starboard bow about two points, and Mr. Ames said, ‘I tried to get clear, reversed my engine and throwed the wheel over *and cut across the bow*, and we were too close before they could get away from each other’ ” (248).

A sober, intelligent and well versed seaman would have known that he had no call to cut across her bow. He cut across the bow at his peril.

The America, 37 Fed. 813.

B.

THE EAGLE'S FAULTS. BURDEN ~~TO~~ HER. THE LAW.

We think, then, that the evidence establishes the following faults on the part of the Eagle, viz.:

(I) In running at night without lights, thus violating the statute and precluding the Wildwood from seeing her.

(II) In not seeing the Wildwood's lights.

(III) In turning to port instead of to starboard, thus violating the statute and directly causing the collision.

These delinquencies and shortcomings on the part of the Eagle, clearly show negligence, unskilfulness and violation of statute, continuing up to the time of, and directly causing the collision, and make out a case of gross negligence against the Eagle which must hold her to sole and full liability, unless she has shown *by equally clear evidence* that the Wildwood was guilty of negligence and that such negligence contributed to the casualty. This is the Eagle's burden under the authorities.

"Where the fault of one vessel is clear and is sufficient to account for the collision she has the burden of establishing the *contributory* fault of the other vessel by *equally clear evidence*."

The Umbria, 166 U. S. 404;

The Oregon, 158 U. S. 186-197;

The Ludwig Holberg, 157 U. S. 60, 71;

The City of New York, 147 U. S. 72, 85;

Comparia v. Boston, 278 Fed. 868;

The Lexington, 275 Fed. 280;

Otto V. Fiegler, 259 Fed. 435;
The North Point, 205 Fed. 958;
The Ashbourne, 181 Fed. 815;
The Saratoga, 180 Fed. 620;
The Pocomoke, 150 Fed. 193;
A. S. S. Co. v. American, 129 Fed. 65.

“Where the faults of one vessel are so gross as to fully account for a collision any doubts as to the proper management of the other should be resolved in her favor.”

The City of New York, 147 U. S. 72, 85;
The Lowell M. Palmer, 142 Fed. 937-943;
N. A. Dredging Co. v. Cutler, 162 Fed. 457,
 9th Circuit;
The Persian, 224 Fed. 441;
Baltimore v. Coastwise, 139 Fed. 777.

C.

The Eagle has not sustained her burden. The Wildwood has sustained her burden.

The specifications of contributory negligence on the part of the Wildwood which are set forth in the Answer, as well as those additional specifications which are here relied on, are epitomized in Assignments of Error Nos. 8 to 22, incl. (287), and same are here answered as follows:

(1) The claim that the Wildwood was in fault in not maintaining an efficient lookout (Assignments Nos. 8, 13, 17, 18, 20, 21, 22).

Answer:

(a) Presumptions:

The displaying of proper lights and the *direction as to the way to turn*, are statutory; and failure to obey the statute is presumptively (at least) negligence. (*The Pennsylvania*, 19 Wall. 125.) This failure on the part of the Eagle to display lights and to turn to starboard was clearly shown and shown also was it that such failure was the direct and immediate cause of the casualty. The burden, then, was on the Eagle to show "by equally clear evidence" that the Wildwood was guilty of contributory negligence.

Appellant claims that he has sustained this burden by showing that the Wildwood had no lookout stationed in the bow and on page 49 of his brief he contends that

"The Wildwood must show that her violation of the collision rules *could not* have contributed to the result before she can escape responsibility for mutual fault and a divided liability."

Wildwood need not show that absence of lookout in bow could not have contributed.

If by "collision rules" appellant means only *statutory* rules, we assent to the proposition as stated, but if he includes the prudential rule Art. 29 we cannot agree. Appellant (on p. 49) cites *The Pennsylvania*, 19 Wall. 125; 22 L. Ed. 148, and says "We see no reason why the reasoning of the court in that case should not apply." Appellee sees no reason. The case does not aid appellant in the slightest

degree. The excerpt which he quotes is against him, to-wit: "*is in actual violation of a statutory rule.*" There both vessels violated the statute, and the presumption was that each violation contributed to cause the collision; the court saying, "Such a rule is necessary to enforce obedience to the mandate of the statute." But in the case at bar, while appellant twice violated the statute (to-wit he turned to the *left* and he displayed no lights), yet the utmost that can be said against the Wildwood is that she had no special lookout in the bow of the boat. The latter failure is not a violation of statute but only of a prudential rule. If the Wildwood had not displayed lights, then we grant that her burden would have been as heavy as that of the Eagle; that is to say each vessel would have had the burden of proving that its violation of statute did not contribute and *could not* have contributed to cause the collision.

The difference between the presumption arising from violated statute and that arising from other negligence is aptly referred to in *The Providence*, (282 Fed. 658-663, decided July 11, 1922). There *The Providence* libeled the *Georgia*. The evidence showed violation of statutory rules on part of the *Georgia* directly causing the collision. The *Providence* contended that any doubts regarding its own management should be resolved in its favor, citing cases. The court would have applied the rule then contended for, had it not been that the *Providence* was itself in violation of *statutory* rules. The court said:

“But we are met by the fact that the case of the Providence discloses a *statutory fault*, non-compliance with Article 16. We have a *collision of presumptions* and a *disturbance of the ordinary rules* concerning the burden of proof which were applied before the adoption of the second paragraph of Article 16. The question whether a specified act of negligence is a cause of the accident is a question of fact and not of law. *Marsden on Collisions* (6th Ed.) p. 20. *But from a proven statutory fault* there arises a presumption of the contribution of this fault to the collision. *The Martello*, 153 U. S. 64-74; 38 L. Ed. 637; *The Pennsylvania*, 19 Wall. 125; 22 L. Ed. 148.”

The case of the *Fannie Hayden*, 137 Fed. 280, cited by appellant at page 42 of his brief is to the same effect. In that case it was sought to hold the Lettie May for contributory negligence in that she had no proper lookout, but the court says on page 283:

“We have not found that the Lettie May had violated or disregarded any statutory regulations. * * * Where it appears that the vessel has only neglected the usual and proper measures of precaution and has not violated any statutory regulations, the burden on her to show that the collision was not owing to her neglect as the efficient cause is only the ordinary one.”

None of the other cases cited by appellant on this point go so far as to hold that the absence of a lookout stationed in the bow throws upon the vessel so offending the burden of proving that such absence *could not* have availed to prevent the collision—certainly not in cases where the gross negligence

and violation of positive statute by the other vessel directly and immediately caused the collision. To so hold would be to go counter to the uniform holding of the Supreme Court.

“Where the fault on the part of one vessel is established by *uncontradicted* testimony, and said fault is of itself sufficient to account for the disaster, it is not enough for said vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt as to the conduct of such other vessel should be resolved in its favor.” (*Alexandre v. Machen (The City of New York)*, 137 U. S. 72, 85; 37 L. Ed. 84.)

[In the case at bar, it is the same as if the fault of the Eagle were established by *uncontradicted* evidence for by the waiver of assignments of error on that point the case now is as if there were no appeal on that point. This establishes the fault of the Eagle (*The Atlantic*, 119 Fed. 568-572; *The Livingstone*, 113 Fed. 879-881).]

“These deficiencies in the watch are rather evidences of negligence and lax management * * * than distinct faults in themselves and would not be sufficient to condemn the vessel *in the absence of evidence that they contributed to the collision*. The question still remains, what was the particular act or omission which brought about the collision.” *The Oregon, supra*.

And this from *The Victory and The Plymothean*, 168 U. S. 410:

“The *recognized* doctrine is thus stated by Mr. Justice Brown in the *Umbria*, 166 U. S.

404-409, 'Indeed *so gross* was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in the City of New York, 147 U. S. 72-85, and the Ludwig Holberg, 157 U. S. 60-71, that any doubts regarding the management of the other vessel *or the contribution of her faults, if any* to the collision should be resolved in her favor'."

However gross was the fault of the Umbria in that case, it could not have been grosser than the fault of the Eagle, for by traveling at night in the shadows without lights the Eagle not only "flew in the face" of the statute but also gave indication of a reckless indifference to her own fate as well as the fate of others—a sheer invitation to calamity,—and by disregarding the "port helm" or "keep clear" rule—the "turn to the right" rule—she but added ignorance, stupidity, unskilfulness or intoxication to that "nautical sin" which was of itself sufficient to deprive her of salvation.

Sufficient if evidence leaves the matter of contribution in doubt.

So that the utmost appellant can successfully contend for is this, to-wit: That he has sustained the burden cast upon him, by showing that the Wildwood had *no lookout stationed in the bow of the boat*; and that having shown that fact the presumption is that the absence of a lookout so stationed *did contribute* and that appellee must rebut that presumption by showing that such absence *did not contribute*. Certainly he has no foundation for

contending that appellee must show that such failure *could not have contributed*.

But even the presumption that the absence of a lookout in the bow *did* contribute is strong or weak according to the facts and circumstances.

From the Umbria case we must gather that when the negligence of the one vessel is *gross*, the presumption arising from a fault of the other is overcome if the evidence shows that there are

“any doubts regarding the management of the other vessel *or the contribution of her faults to the collision*”;

and a late case is to the effect that such presumption

“could not apply to a case where it is merely speculative whether the pilot could have done anything that would have avoided the collision, nor to a case where it is uncertain whether a duly vigilant lookout would have made the discovery substantially earlier than the pilot did make it.”

Otto Marmet Coal Co. v. Fieger, 259 Fed. at page 447.

Chief Justice Taney in *Harvey v. Baltimore* (23 How. 292; 16 L. Ed. 562), albeit in a dissenting opinion, said:

“It has been argued that the lookout ought to have been in the bow, and some passages in the opinions of this court in former cases are relied on to support this objection. But the language used by the court may always be construed with reference to the facts in the particular case of which they are speaking, and the character and description of the vessel. What is the most suitable place for a lookout is obviously a ques-

tion of fact, depending upon the construction and rig of the vessel, the navigation in which she is engaged, the climate and weather to which she is exposed and the hazard she is likely to encounter”;

Appellant is forced to dwell upon and emphasize those decisions of this court and of other courts to the effect that the proper location of a lookout is in the bow or “eyes of the ship”. Most of the cases so holding have been cases of tugs doing harbor work or of other vessels in the track of extensive commerce, or of vessels in fogs where lights are not easily seen, but in every case the rule depends for its application on the circumstances.

The *Tillicum* case.

Great stress is put by appellant on the *Tillicum*, 217 Fed. 976, affirmed by this court in 230 Fed. 415, but the case is inapplicable.

In that case the *Tillicum* had no lookout except in the pilot house and the court held her to the task of proving that that fact did not contribute; but there, the *Rosalie*, the colliding vessel, was not guilty of *gross* negligence. She stopped on hearing the *Tillicum*’s fog whistle, but she did not stop for a long enough period of time. She was guilty of negligence but not of such negligence as called for the application of the rule laid down in the *Umbria*, and kindred cases. If she had been guilty of *gross* negligence (as, for instance, if she had not stopped at all, or had blown no fog signals) we ap-

prehend that the "Umbria" rule would have been applied.

Now the case at bar presents such facts as *do* call most loudly for the application of the rule of the "Umbria". Here was the grossest kind of negligence on the part of the Eagle. For a steamer to travel at night in shadows, without lights is a flat defiance of statute and of that immemorial custom upon the observance of which "those who go down to the sea in ships" have a right to rely.

The Tillicum case differs from the case at bar, in this also, to wit: There, the vessels were of considerable size and they were in a "dense general fog", in the harbor of Seattle and in the track of extensive commerce, and the Tillicum had a barge alongside whose bow projected beyond the bow of the tug, and the barge was loaded with oil tank cars which extended upward a considerable distance from the deck of the barge. Each vessel had heard the fog whistle of the other and knew that a collision was "in the cards". At best the location of each vessel could only be determined approximately by the fog signals. The vagaries of sound are well known. Sound is often strangely deflected by intervening objects. The Rosalie approached the Tillicum ~~from~~ ^{on} the "barge side" and it was probable that a lookout in the pilot house could not locate the Rosalie as accurately as a lookout stationed forward on the barge could have done. But in the case at bar there were two small fishing vessels, neither of which carried passengers. They were not in a "crowded port" nor in a port at all nor in the track of

any extensive commerce nor in a fog. Neither of them had a lookout in the bow. The Wildwood was only 45 feet long and a lookout stationed in the bow would have been only a few feet from the pilot house. The Wildwood was not expecting and had no reason to expect that a vessel would loom up out of the darkness. There was no intervening object to obscure a light, if there had been a light on the Eagle; but as there were no lights on the Eagle, a lookout could not have seen that which was not there to be seen. Could he have seen the Eagle even though she had no lights? Ames says No (210). No witness says Yes. Could a lookout stationed in the bow have seen the outline or shadow of the Eagle when the Eagle was travelling in the shadows? Consider the darkness of the night especially upon the water (Answer, pp. 17 and 18; Selig, 311-345; 260, 261, 341, 345, 346; Kinyon, 145, 110; Mrs. Kinyon, 104; Ames, 223).

It is easy enough to point out evidence showing that a special lookout *in the pilot house* of the Wildwood would not have seen the "dark object" any earlier than did Ryan. We need only refer to the evidence of Ames and Olander kept a sharp and vigilant lookout and were unable to see the Wildwood when she was only fifty or sixty feet distant from the Eagle. Ryan, then, though alone in the pilot house of the Wildwood, was a good lookout for he saw as well as Ames and Olander and they are said to have been

sharp and vigilant, and yet unable to see the Wildwood because according to the answer the night was dark and she had no lights.

Again, a lookout in the bow would have been only about twenty or twenty-five feet ahead of Ryan. With a boat traveling, as the Wildwood was traveling, at the rate of ten feet per second, this 20 or 25 feet advantage corresponds in point of time to 2 or $2\frac{1}{2}$ seconds. Grant then that a lookout in the bow would have seen "It", 2 or $2\frac{1}{2}$ seconds before Ryan saw "It", what was "It"? Nothing but a dark object without lights. The lookout would not know what it was nor which way it was heading if it was moving at all. Ames and Olander could not distinguish those particulars although they were within 50 or 60 feet of the Wildwood. Before a lookout in the bow of the Wildwood could have determined what the object was and whether it was moving, and if so which way it was heading, i. e. before he could determine whether any danger threatened and could communicate to Ryan, the 2 or $2\frac{1}{2}$ seconds would have elapsed. Two or two and a half seconds is almost "*instantaneously*". We do not believe the court is going to compel us to figure so closely, in the face of the clearly proven gross negligence and violation of statute on the part of the Eagle.

"A steam vessel without lights cannot insist on too rigorous a lookout on the other vessel."

The Alice M. Guthrie, 257 Fed. 472.

"The fault on the scow's part (having no light which brought about the collision so far

outweighed in importance as causes tending to bring it about, any deficiency which can reasonably be imputed to the ferry boat's lookout from the fact that it was not kept from her bow, that she cannot justly be held responsible in any degree. Under such circumstances any reasonable doubt is to be resolved in her favor."

In re Eastern Dredging Co., 159 Fed. 548.

"While the Steamer Tarpon did not have a proper lookout I am not satisfied that the absence of such lookout caused the collision or that the presence of one would have availed to prevent it. Doubt must be resolved in her favor."

The Tarpon, 132 Fed. 277-279.

"The faults of the Mellinock were so glaring, so numerous and so fully do they account for the disaster that the court should not be particularly astute in the endeavor to discover some contributing fault on the part of the Persian committed at a time when inerrable judgment is not to be expected."

The Persian, 224 Fed. 441.

The case then comes to this. It is an absolute certainty that the operators of the Eagle were flagrantly in fault and that such fault on their part was an efficient and a proximate cause of the collision; whereas it is at the most no more than a matter of speculation whether or not the absence of a lookout contributed. In such case the damages will not be divided.

Otto Marmet Coal Co. v. Fieger, Austin (supra).

“In case of unequal fault the gross fault is the cause of the loss and slight fault is immaterial—did not contribute.”

The Lord O'Neill, 66 Fed. 77.

Ryan's statement.

Much is made by claimant of the statement of Ryan that if he had been looking over the port bow and watching closely he might have seen it (the Eagle), but this statement is not to be segregated from the question to which it is an answer. The question and answer are found on page 147, viz.:

Q. Yes, but with a moon now nearly full and half way up now on the horizon, clear night, not obscured, you could see the outline of the Eagle on the water some distance away, couldn't you?

A. If I had been looking over my port bow and watching closely I might have seen it.

Can claimant maintain that it was a clear moonlight night “not obscure”? To do so he must discredit all the witnesses, himself included. *Selig* says “When we got to black rock it got dark and calm.—A calm night like that is the worst you have to contend with. On any other night a ripple on the water shows light—With calm water it is just *the same as traveling in the woods* (237)—the moon was there—very cloudy over it (268)—you could only see it once in a while (311). *We weren't within the range of that moon* (268). *We had been running in the shadows for about twenty minutes before the collision* (260-4)—*that was the dangerous part of the trip* (260-1)—moon had just come up over the moun-

tains (264-8). Moon not yet bright—it was cloudy (268)—*it didn't light up the waters* (269); and Mr. Kinyon—"There was a moon at times—the moon was shining on the particular spot of the collision; part of the time before it was obscured by clouds (110); and Ames (223) and *the Answer* (17 & 18).

Clearly Ryan's answer to the said question is predicated on the conditions recited in the question, to wit "clear night, not obscured." But it was not a "clear night" and it was not "not obscured," on the contrary, on the water it was obscure and that obscureness would be intensified to one who gazed into it across a moon sheen. In *The Lituania*, 189 Fed. 560 (April 20, 1911), a schooner collided with steamer. The court found that the schooner displayed no lights, and said, "The only question in the case is whether the steamer is at fault, even then, for not seeing the schooner. I can hardly think so. I know of such nights as those that have been described by the witness where it is clear overhead and where it is exceedingly hard, *unless there is a light*, to see near the water * * * I doubt very much, under these circumstances whether a most diligent lookout would have discovered or could have discovered a schooner, if it had no lights out, in time to avoid the accident." Libel dismissed.

Ryan did not hear Eagle's exhaust.

It is contended that because Mr. and Mrs. Kinyon could hear and did hear the sound of the Eagle's exhaust therefore Ryan or a lookout could and should have heard it, and, so hearing, could and

should have known that said sound was made by a boat; but this conclusion does not follow, for the conditions were entirely different. It must be remembered that Mr. and Mrs. Kinyon were at the lighthouse in quietness and solitude, while Ryan was (and a lookout would have been) on the Wildwood which was going through the water at the rate of 10 feet per second, and the Wildwood's own exhaust and the sound of the water would drown, to him, the sound of the Eagle's exhaust,—especially as (according to Selig) the Eagle's exhaust "was half under water, and there is a brass outfit over that exhaust and it would throw the sound back toward Tree Point," and it is "a very quiet exhaust—lots of water—not a dry exhaust" (249). Did the Eagle hear the Wildwood's exhaust?

Dark object seen by Mrs. Kinyon.

It is said that Mrs. Kinyon saw the outline of the Eagle and that Ryan or an outlook could and should have seen it. It is submitted that a fair reading of her testimony does not bear out the statement that she could make out the outlines of the Eagle or even of any boat. The testimony is on page 100. She said, "Yes, I could discern an object barely with my naked eye, a dark object * * * If you see a log out there, you couldn't tell whether it was the end or the side of the log * * * I could see this dark object moving." The time she is there speaking of was "at that time"—"when they were dangerously close."

And too there is no evidence that the “dark object” which Mrs. Kinyon saw was the “dark object” which Ryan saw. The moon in the East would cause the shadows to fall westward. Mrs. Kinyon was to the westward of the boats and the Wildwood was nearer Mrs. Kinyon than was the Eagle. We know that the dark object Ryan saw was the Eagle emerging into the sheen, but the dark object Mrs. Kinyon saw might have been the shadow of the Wildwood or the shadow of the Eagle or the Eagle itself emerging into the sheen. About one second after Ryan saw the dark object the Eagle’s lights were flashed on (145) and until the lights were flashed on he “didn’t know whether it was a big log or a boat or just a shadow on the water” (147) and neither did Mrs. Kinyon—She refers to it as a “dark object” moving, but she could not tell which way it was moving. She knew the Eagle was out there but Ryan had no reason to suppose that there was any other vessel in the vicinity. Even if it be admitted that the “dark object” seen by her was the “dark object” seen by him, still there is no evidence that he did not see it as soon as she did—as soon as it appeared—as soon as it was discernible by any one at any distance.

The Kinyons were on an elevation.

It is claimed that as Kinyon saw the Eagle when a mile to the south of the lighthouse Ryan or a lookout would have likewise seen it; but Kinyon was on an elevated station, to wit the porch of the lighthouse, and his attention had been called by the

exhaust and he expected to see a vessel and even then he could only see it through the glasses, and he was not looking across a sheen of the moon; while Ryan was not, and a lookout would not, have been expecting to see a vessel without lights, and he was on the *Wildwood*, a small boat—not on the porch of the lighthouse; and, too, he had to look across a sheen of the moon. Besides, Kinyon even with glasses saw it for about four minutes only (109). It is reasonable to assume that when he looked the intermittent glimpses of the moon helped the glasses. It does not appear whether the *Wildwood* was or was not equipped with glasses—presumably she was so equipped; but whether she was or was not so equipped, the *Eagle*, travelling in dark shadows at night without lights is in no position to insist that those on board the *Wildwood* should glue their eyes to glasses for the purpose of perceiving *them* in the act of violating the statute and recklessly inviting disaster to others and to themselves.

The evidence, then, shows that it is not probable that the fact that there was no lookout in the bow of the *Wildwood*, at all contributed. That, certainly, is as far as it is necessary to go to rebut the presumption, for it would of course be absolutely impossible to prove to a mathematical certainty what some one would have seen, if that same one had been at a particular place at a particular time. There can be only a balancing of probabilities. Surely it cannot be said that there is “no doubt” or

that the *contributory fault* of the Wildwood has been established by “*equally clear*” evidence.

After all, the rule of law that he who alleges causative negligence must prove it is not changed by presumptions,—the burden does not shift from him simply because he is allowed to prove by the aid of a presumption that which he is required to prove. The presumption is evidence in his favor, it is true, but the question still is, Has he proved by a preponderance of evidence that the alleged negligence *contributed*?—and in considering that question all the facts, circumstances and probabilities are to be weighed with a view of determining whether or not, (in a case of this kind where positive violation of statute and gross negligence *directly* causing the collision has been clearly shown) contributory negligence has been shown by “*equally clear evidence*”—all doubts on that score being resolved in the negative.

(b) The court's finding.

The trial court said: “However looking at the situation of the two boats as I find them to have been at the time of the collision, I am inclined to believe that the lack of a proper lookout on the Wildwood” was not a contributory cause of the collision. It appears from the testimony that Ryan, master of the “Wildwood,” saw a black object which he thought to be a log, about two points off the starboard bow. Mrs. Kinyon also testified that just prior to the collision she saw a black object, which

she was unable to identify, but considered it to be a log just prior to the time of the accident. If it were, as Ryan supposes, a log which he saw, he, by keeping on his course, would have avoided it, but when the lights of the "Eagle" were flashed on, it was too late to avoid a collision. The proximate cause of the collision was the lack of lights on the "Eagle" up to the time when too late to avoid the collision. If the lights had been on the "Eagle" at the time when Ryan, the master of the "Wildwood," first saw the black object, the collision would have been avoided⁾ (33-34).

Ryan saw the Eagle in time to avoid a collision and he did the right thing to avoid a collision; Ames saw the light of the Wildwood in time to avoid a collision, and he did the wrong thing and caused the collision. He said, "The Eagle takes the wheel immediately she is thrown over" (227); and Selig says that in 125 feet the Eagle will turn 16 compass points—half circle (243). The absence of a lookout on the Wildwood, then, was simply a condition, not a cause, of the collision.

The absence of a lookout immaterial, when

The Oregon, 158 U. S. 186;

The Annie Lindsley, 104 U. S. 185;

The Wanata, 95 U. S. 600;

The Geo. W. Elder, 196 Fed. 137, 9th Circuit;

The Wrestler, 144 Fed. 334;

The George Dumois, 153 Fed. 833;

Otto Marmet Coal Co. v. Fieger, 259 Fed. 427,
447;

The Elk, 102 Fed. 697.

(c) **An afterthought.**

In the answer appellant contended that the Wildwood solely was in fault and he enumerates her faults as consisting only of failure to exhibit lights, failure to sound a port helm whistle, and attempting to make a port to port passing. He there says nothing of the absence of a lookout in the bow or of failure to discern the Eagle and yet at that time he knew as much about those points as he knows now. At that time he realized that a lookout on the Wildwood would not have been effective to discern the Eagle, for in the Answer (Par. IV, pp. 18-19) he alleges that the Eagle kept "a sharp and vigilant lookout" (Ames and Olander) and that they did not and could not discern the Wildwood until she was within 50 or 60 feet of the Eagle." He says this inability was because of the absence of lights on the Eagle, and the evidence of Ames is to that effect. But the evidence in the case showed clearly that the Wildwood displayed lights and that the Eagle displayed none and that twenty minutes before the collision and up to the time of the collision the Eagle had been traveling in the shadows (Selig 261) and that the collision occurred in the sheen of the moon, and that the Wildwood did not attempt to make a port to port passing but that the Eagle did so attempt. He therefore executes an "about face," acknowledges his faults, and in his desperation seeks this "loop to hang a doubt upon."

(II) The claim that the Wildwood was in fault in failing to blow a whistle signifying "port to port"

before turning to starboard (Assignments Nos. 15 & 16).

Answer:

The lower court, on this point, said:

“When the lights were flashed on the ‘Eagle,’ at the most four seconds only, perhaps less, ensued, before the collision and there was no opportunity to give him the signal. The right of way was with the ‘Wildwood.’ The approaching vessel was off the port bow apparently head on and the obvious thing for the helmsman of the ‘Wildwood’ to do was to immediately turn her to the starboard, and, in a case of extreme danger like this, the omission to signal cannot be considered a fault.”

This was also the contention of the Eagle as evidenced by the Answer. Each vessel discovered the other at practically the same time. The Eagle sounded no whistle, but the Answer excuses her,—saying that “The time in which to act was so short that the failure to give whistle signals did not affect and could not in any manner have affected the situation which said colliding vessels were in prior to the coming together of said vessels.” (Answer par. IV, p. 20). *In the Answer* appellant was contending for *sole* liability of the Wildwood and he could not afford to charge as a fault of the Wildwood a shortcoming of which the Eagle itself was guilty, *but now* that he is contending only for a *divided* liability he can afford to charge as shortcoming on the part of the Wildwood the very things which he had previously alleged to be excusable. By so doing he has “everything to gain *and nothing to*

lose.” But we submit that the gate which he has erected still stands to bar his retreat.

Appellee, however, is not content to rest on the admission in the Answer nor on the finding of “in extremis” made by the court; for, irrespective of said admission and said finding, it is apparent that such omission did not contribute to the happening. Convincing evidence of this comes from Ames himself. The sounding of the whistle would have told Ames only this, to wit: to port his helm. That, however, is exactly what he should have done if he received no signal to starboard the helm, for that is the Rule of the Road. By his testimony that is what he did do. His contention is not that he was misled into doing the wrong thing, but that as a matter of fact he did not do the wrong thing. Ames says that the Eagle turned to starboard and that the Wildwood also turned to starboard. Assuming that Ames was sober and versed in the regulations he would have expected the Wildwood to do just what she did do, and assuming that Ames is telling the truth about the Eagle turning to starboard, he did just exactly what he would have done if Ryan had signalled a port to port passing. What effect then did Ryan’s failure to sound the whistle have on Ames? The answer must be that it could have had no effect at all, for it did not cause him to do anything that he should not have done if the signal had been given.

Speaking of the omission to signal it is said,

“The decision of the question whether the failure to sound a signal contributed to the col-

lision, will, however, often depend on the judgment of the Court, as to what would have been its effect on the mind of the man in charge of the other vessel if it had been sounded, and to answer this hypothetical question it will be frequently necessary to consider whether the omission could possibly have contributed to the collision. A practical test suggested in *The Tempus* is, would sounding the signal have made it easier for the other vessel to do something to avoid the collision. The statutory obligation to obey the regulations remains, so that it is negligence not to observe an applicable regulation * * * but the question whether a breach of the regulation *contributed* to the collision is one of pure fact for the court to decide on the whole of the evidence." Marsdon's *Collisions at Sea*, 7th Ed. pp. 70-71.

(III) The claim that Ryan (the Wildwood) was in fault in failing to stop, reverse and give the danger signal when he was in doubt about the dark object on the port bow. (Assignments Nos. 9, 10, 21).

Answer:

What was this dark object? When and where was it seen? How long was Ryan in doubt as to what it was? What did Ryan have time to do? What did he do and what should he have done? These are all pertinent inquiries.

For twenty minutes prior to the collision the Eagle had been and was traveling in the dark shadows without lights; the collision occurred in the sheen of the moon. The dark object was evidently the Eagle just emerging into the sheen from out the shadows in which it had been traveling.

The doubt in Ryan's mind as to what the dark object was, was of only an instant's duration. The quick flashing on of the Eagle's lights dissolved that doubt. Ryan says "and was holding her on her course *when all of a sudden* I thought I seen a shadow ahead and *just then* the lights of a boat flashed on headed straight at me on the port bow" (138);—Just then, i.e. immediately, i.e. within a half second or a second (139).

Appellant maintains that within that second or half second Ryan should have stopped, reversed and given the danger signal. Ryan did not do this, but he did something infinitely better—he "*promptly* swung the helm to port" (138) keeping his speed. What he did was the usual thing—the "to be expected" thing—the thing called for by the Inland Rules and the Rule of the Road and by "second nature"—he turned to the right as far as he could get, quick. If he had stopped his engines the Wildwood would not have stopped immediately, and the Eagle would have struck the Wildwood about midships. But by turning to starboard and keeping his speed, there was a chance to get out of the range of the Eagle, especially if the Eagle should do what she would naturally be expected to do and what the law required her to do (i. e. turn to her starboard). Ryan, then, was expressing it modestly when he said "I did the best that I could by throwing the boat hard to starboard and if he did the same thing probably we wouldn't have had the collision" (152). The lower court said, "If the Eagle had turned to the star-

board she would have cleared the Wildwood or at least have struck her only a glancing blow" (30—bottom).

How much time was there between the flashing on of the Eagle's lights and the collision? The Eagle struck "not more than three or four seconds after she flashed on her lights" (Ryan 139), "It was such a short time there was no time for thinking" (Mrs. Kinyon 102), "Not more than two seconds—there was the flash of the light and then the impact" (Mr. Kinyon 109). And yet, appellant would have Ryan occupy that time by stopping, reversing and giving a danger signal instead of doing his best to get away. Danger signal—for what? Was not the danger apparent and imminent? Would a danger signal have thrown any light when the two boats were in such close quarters, and when each knew of the presence of the other? Under such circumstances the danger signal would have been simply "the last wail before the crash".

The rules were made to prevent collisions and they are all subject to the general prudential rule that

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, *and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger*" (Art. 27 Inland Rules).

The danger signal is to be given "when either vessel fails to understand the course or intention of

the other” and is desirous of ascertaining that course and intention or to signify some danger. Here the collision was imminent. Ryan saw the Eagle’s lights, 2 points off his port bow, heading right at him. That was no time to signal—to say “There is danger” or to ask “What are you going to do?”—to wait for a reply and then to act. It was a time for movement and speedy movement at that—a time to get away as quickly as possible. To give a danger signal when the danger is apparent and imminent is “to say an undisputed thing in such a solemn way.” Ryan tried to get away by turning to his starboard—Ames, we have no doubt, wanted to get away but he didn’t know how—he turned to his port, which is just the thing he shouldn’t have done. Was he drunk, or ignorant?

Nor can Ames be excused on the ground of error “in extremis” because (1) he maintains he made no error, (2) error “in extremis” cannot be invoked where the situation is produced by one’s own fault, as this was, by his failure to display lights and to see the Wildwood’s lights.

The Winona, 19 Wall 41;

The Dexter, 23 Wall 69;

The Albert Demos, 177 U. S. 240.

(IV) The claim that the Wildwood was in fault in not showing a range light (Assignment No. 19).

Answer:

The testimony shows that there was a range light—a regular light, lighted—on the pilot house—eight feet above the deck—not on same mast with the mast

headlight (276-7). This is not denied, except indirectly. The utmost that can be said is that no one had testified on that point—no one was asked about it—until at the very closing of the evidence (276-7). Besides what good would a range light have done? How would it have averted the collision? If the “sharp and vigilant” outlook of the Eagle could not and did not detect the side lights of the Wildwood, and did not detect the mast headlight of that vessel until it was fifty or sixty feet away, is it at all probable that a range light further away would have improved the vision or clarified the judgment or nerved the hand of the men in the Eagle’s pilot house?

(V) The claim that the Wildwood was in fault, in that the master (Ryan) was not 21 years of age (Assignment Nos. 11 and 12).

Answer:

On this point the lower court said:

“The question of the age of the master of the ‘Wildwood’ cannot be material * * *. It was not necessary, at the time of the accident, that the ‘Wildwood’ should have been in charge of a licensed master, for she was not, at that time, carrying passengers. Moreover, whether it was necessary or not, the master of the ‘Wildwood’ had received his license as such, presumably on the authority of the local inspectors and the owner of the ‘Wildwood’ was justified in relying upon that certificate. Again, I can discover no negligence or incompetency on the part of the master of the ‘Wildwood’ after the first discovery of the approach of the ‘Eagle’. He acted promptly and did the necessary and obvious thing by sheering off to starboard. The

contention of the claimant on this point cannot be allowed" (32). See Sec. 5 Act approved June 9, 1910.

No enlargement is called for.

(VI) The claim that the Wildwood was in fault because the master was temporarily absent from the pilot house (Assignment No. 14).

Answer:

This claim is a mere clutching at straws. That Ryan did so leave the pilot house is testified to by him as follows: "Well about six or seven minutes before we got to Mary Island light I went down and hollered to Harold to get the course from Mary Island to Tree Point"; Harold gave him the course and Ryan went back and "put her on it" (138). Ryan just stepped out of the pilot house and "hollered down the companionway"—didn't go up to the companionway (275-6). This occurred six or seven minutes before they got to Mary Island light—and at about 3600 to 4200 feet north of the light (reckoning the Wildwood as going seven miles an hour or ten feet per second), and when the Eagle was approximately one mile to the south of the lighthouse, or nearly two miles distant from the Wildwood. It could have taken only a few seconds—20 or 30 seconds Ryan says (276). This short temporary absence from the pilot house at that time and place could not possibly have been a contributing cause, for it is to be remembered that Ryan had not, at that time, seen any "dark object" and there were no lights to see. Ryan very aptly says,

“I don’t know as I would because when I was looking out at night I expected to see lights if a boat was in the distance” (147). He was back at his post in ample time and there is no evidence that he again left it.

In conclusion on this branch of the case, it is submitted that in the answer the only negligence charged to the Wildwood was “failure to exhibit lights” and “failure to signal” and “attempt to make a port to port passing”. We have shown, we think, that it was not the Wildwood which failed to display lights—but, on the contrary, that it was the Eagle; that it was not the Wildwood which attempted to make a port to port passing but, on the contrary, that it was the Eagle; that the failure to sound the whistle could not possibly have been a contributing cause.

The answer called on libellant to meet only those charges made therein. He met them, but straightway is confronted by appellant with other specifications not theretofore mentioned. He has met them also.

Claimant was guilty of the grossest negligence directly causing the collision. He has not met the burden cast upon him by that negligence. On the contrary, he seeks to escape its full consequences by magnifying things of little or no bearing. To allow him to do so, would be (it seems to us) to put a premium on traveling by boats at night without lights, on ignorance, on unskilfulness, on flagrant violation of positive statute.

II

D

AS TO DAMAGES.

Damages were awarded to the Wildwood as follows, viz.: To the hull \$1050; and for other items not involved in this appeal.

There is no assignment of error as to any of these allowances (See Waiver of Assignments, pp. 300 et seq.). Appellant is therefore concluded; but appellee contends that the sum (\$1050) allowed as damages to the hull should be increased by \$250 and that interest on all the items at 8% per annum from date of the collision, should be allowed.

Damage to the hull.

Immediately after the Wildwood was towed to Ketchikan her owner had her surveyed and estimates made of the repairs necessary and the cost of same (44). He had two rival ship building and repairing concerns examine and estimate. These estimates were made "with a job in view." The presumption is reasonable that each estimate was "figured down" as close as possible. The estimates were made by Otto Inman and George Thompson, the former representing his own concern and the latter representing Schlotan's Marine Railway or Northern Machine Works.

Inman's estimate was \$1328, and Thompson's estimate was \$1300 if a new keel was put in, and \$1052.70 if no new keel was put in.

As the keel was split or cracked (54, 159, 160) by the collision (159 last question and 160) and as libellant was entitled to an uncracked keel, it is apparent that there was only \$28.00 difference between the two bids.

Inman (52, 157, 226) was a man who had lived in Ketchikan for 31 years, during all of which time (and before) he had been in the boatbuilding business (52), was familiar with the Wildwood before the collision (56) having given her an overhauling in 1917 (43) and having frequently repaired her (43) and painted her only 6 months before the accident (159). He "figured" that the boat was then practically as good as new (56). After the collision he found her badly damaged (53). He got her out of the creek and made a thorough survey of her (53-54). He studied her over for two or three days (54). He found that the stern post was knocked clear out and broken, and the planking was cut through practically to the keel, the keel was cracked and the shaft and counter was all knocked out and "she was shook from the stern clear—drawed from her stern back seams all open, you could crawl through the side of her and timbers broken" (54) she was practically a total wreck (57), and yet her timbers were the "natural crooks" of the forest and she had been built extra heavy—strong (56).

Knowing what the boat had been and was at or about the time of collision, and having made a careful examination of her injuries, immediately after

those injuries were inflicted, and having "studied her over for two or three days," and with the knowledge that there was another boat building concern in Ketchikan and that it was to his interest to make as low an estimate as possible and having put "it all down even right up to the last nail, bolts and nails and all" (62), his estimate comes with convincing force. The lower court said that "he seems to have made the most complete examination of the hull" (36). When it is remembered that his competitor's bid is only \$28 less than his, and that there is no evidence or intimation of collusion, there is no ground to say that the estimate of Thompson (\$1300 including the keel) at least, is not a fair and reasonable estimate.

George Thompson (74).

Examined her last summer (summer of 1921—the accident was July 23, 1921) at the instance of libellant (74). His estimate was as above stated, \$1302.50 including a new keel and \$1052.50 without a new keel (75).

He recently also examined the hull and made an estimate for the claimant and his attorney (75). By getting him to make an estimate they attest the fact that they considered him a worthy "estimator". He gave them the same estimate but evidently his figures didn't suit them.

Thompson was a boatbuilder of 34 years' experience—3 years in Ketchikan (74-5). He found no decay, notwithstanding she was built in 1906 (114). "She's a pretty sound boat (82). She was struck

on the port side, but her timbers are sprung and the planking on the starboard side is six or eight inches off—out of plumb” (83).

The testimony of these two experienced men is entitled to the greatest weight and indeed it would seem should be determinative of the question.

Now as against the positive, careful, disinterested estimates of these two experienced boat builders made at the time of the injury, the claimant opposes the testimony of three witnesses, to-wit: C. C. Keesling, James Rasmussen and J. F. Radebaugh.

C. C. Keesling (161).

His examination was only “in a casual way” (162) and was made at the instance of claimant and his proctor (162) for the purpose of testifying (168). He examined her “only about half an hour” (168). This man actually offers to take the job for less than it will cost by his own figures. His estimate is \$500 (163) and yet he figures \$145 for material and \$375 for labor (163)—total \$520. In other words he will lose \$20 on the job. Nay more—he figures ship building labor in Ketchikan at the middle of the fishing season—at \$7.50 per day (165) whereas according to Mr. Radebaugh (another of claimant’s witnesses) such labor brings \$1.25 per hour or \$10.00 per day (193). Labor which at \$7.50 per day costs \$375 would at \$10 per day cost \$500.

This man, an employe of the Forestry service (167) working by the day (171) never saw the Wildwood before the accident (168) and yet he as-

sumes to value the hull before the accident at \$300 (166)—a hull which the uncontradicted evidence shows brought \$350 under water (45) and on which her purchaser had spent \$1300—which had been recently overhauled, which was kept in repair, painted, found to be “as good as new” and in which the witness himself “found no rot” (173)—a hull, too, which even the other two witnesses for claimant value at the time of the collision at two and three times the figure given by him (Rasmussen, p. 202, and Radebaugh, p. 187).

We submit that this testimony ought to be entirely disregarded.

James Rasmussen (204).

Nor is this witness entitled to any credence; for his testimony, too, is strange—very strange.

His business is “Well, gas engineer and working at odd times at boat repairing, too” (195)—“for the last year has worked on any repair work that comes along” (195). He had only a short experience as a boat repairer and the greater part of that has been as an underling (198). His estimate is \$650 not including a new keel (195). A new keel would cost (according to him) \$75 (199) but even if he had to put in a new keel he wouldn’t raise the bid (199)—all of which means that he purposes to donate \$75.00 for the boat needs a new keel. Another philanthropist. His estimate is even more remarkable than Keesling’s for it includes not only \$75 for keel but also \$150 or \$200 for *extra* material (200). Keesling did not figure on *extra* material. Keesling

says the material would cost \$145. Then Rasmussen proposes the following, viz.:

To furnish new keel.....	\$ 75.00
Material	145.00
Extra material	150.00
Labor 1 man 2 mos. @ \$7.50 per day.....	450.00
Total.....	<hr/> \$820.00

If the new keel be included in "extra material" the figure is \$820 less \$75 or \$745 or a loss of \$95; but if we figure the labor at \$10 per day the loss would be \$150 more, or a total loss of \$245. Compared to Rasmussen, Keesling is grasping.

Another evidence of the worthlessness of this man's testimony is the fact that he is willing to fix a value of \$500 on an engine which he never saw and about which he knows nothing except that it is a second hand engine (197-202) and yet the uncontradicted testimony is that the engine cost Brindle \$1200 in New Jersey (206) and actually stood him with freight and interest at \$1800 (45).

We submit that the testimony of both Keesling and Rasmussen should be entirely disregarded.

The only other witness as to cost of these repairs was

Radebaugh (257).

He made no allowance whatsoever for a new keel (188-199). His was not a competitive bid with a job in view, as were Inman's and Thompson's. On the contrary it was for the purpose of testifying

for claimant and so is open to the suspicion which attaches to the testimony of experts, i. e. that their testimony is very apt to be so framed as not to disappoint the expectation of those whose experts they are. This suspicion cannot attach to Inman or Thompson for their estimates were made at a time when no lawsuit was in contemplation.

He did not make as thorough an examination as Inman.

As showing the superficial and unreliable character of Radebaugh's estimate it is only necessary to call the court's attention to same—Libellant's Ex. D [—this is libelant's exhibit although Radebaugh is claimant's witness. The reason for this appears on p. 191 and is as follows—"Mr. COSGROVE. Well then as counsel doesn't seem to desire to present this as an exhibit I would like to introduce it in evidence as part of the cross-examination"].

There is on file with the clerk, Respondent's Exhibit 4 which is not mentioned in the record. We think it must be the detailed estimate called for by Mr. Cosgrove at page 194, because (1) it is otherwise unaccounted for, (2) it contains the item \$100 for sundries and Radebaugh is the only witness who testified to any such item. If it is the figures called for by Mr. Cosgrove, it shows that by Radebaugh's own testimony the sum of \$1347.50 is his true estimate for it figures up \$848 for lumber, \$114.50 for hardware, paint, oakum, etc., \$375 for labor, or a total of \$1347.50, and this, too, without making any allowance for a keel. Somebody must have sworn to

this estimate or it would not be on file as an exhibit—it was not Inman or Thompson, so it must have been one of respondent's witnesses; if not Radebaugh's—whose?

The clear weight of the evidence is to the effect that this item of damages should be increased by \$250.

Interest.

The libel was brought and tried with reasonable promptness. No tender of any kind was made. Interest and costs are in the discretion of the court. General Rule 30, sub. 4. Where there are no special circumstances affecting the matter, the general rule should be applied (*In re Great Lakes Dredging Co.*, 250 Fed. 916). Interest from time of collision (*The El Monte*, 252 Fed. 59). The statutory rate of the state governs (*Cambria S. S. Co. v. Pillsbury*, 212 Fed. 674). In Alaska rate is 8% (Section 684, C. L. A. 1913).

Dated, San Francisco,
February 17, 1923.

Respectfully submitted,

CHARLES H. COSGROVE,
Proctor for Appellee.

ROBERT W. JENNINGS,
Of Counsel.

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

No. 3935

S. L. SELIG, AS CLAIMANT OF THE GAS
POWER BOAT "EAGLE," HER ENGINE,
APPAREL, TACKLE AND FURNITURE, AND
J. R. HECKKMAN, STIPULATOR,
APPELLANTS

VS.

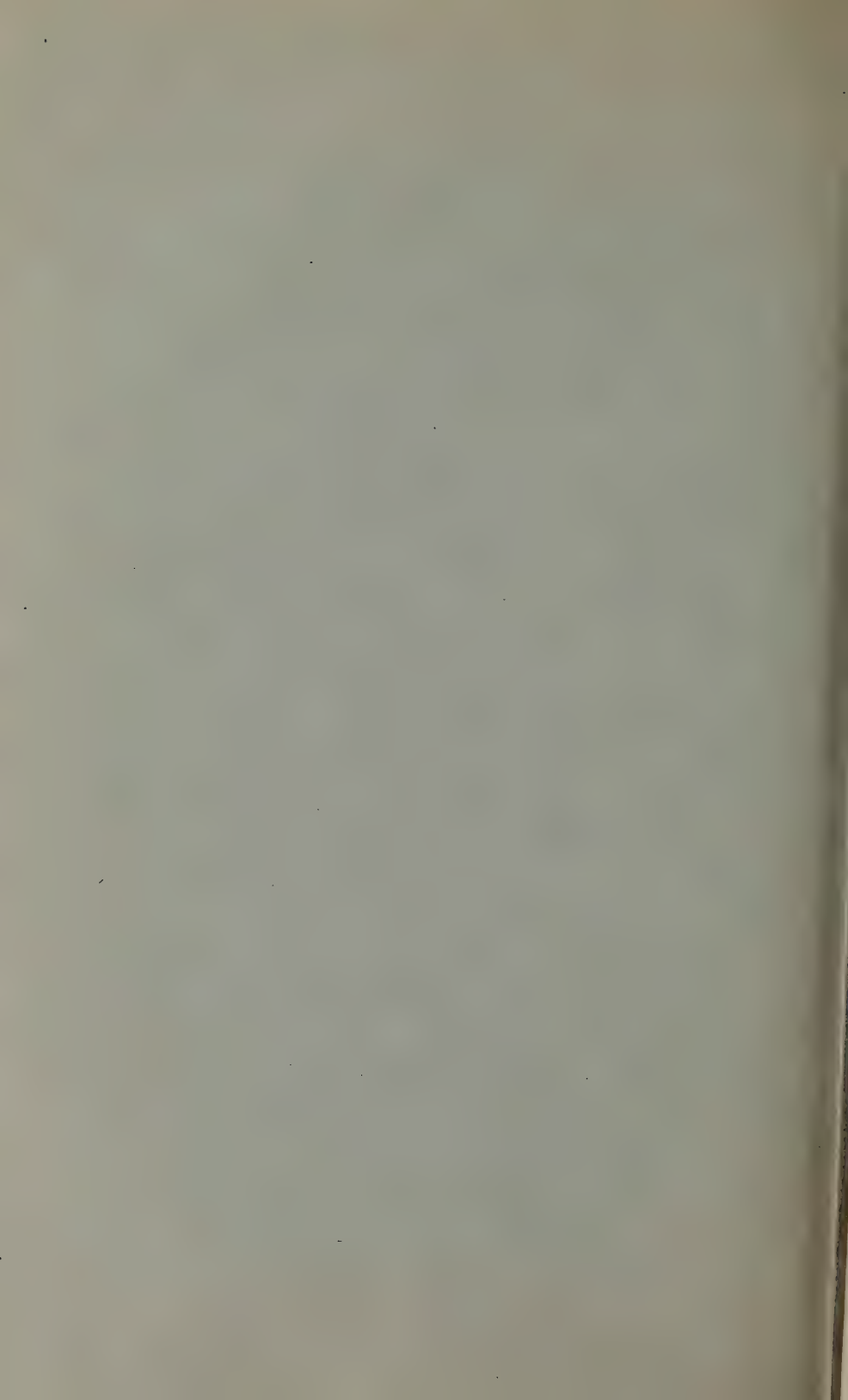
MARY L. BRINDLE, AS EXECUTRIX OF
THE ESTATE OF ALEXANDER BRINDLE,
_DECEASED, APPELLEE

Petition for Rehearing

WINTER S. MARTIN
PROCTOR FOR APPELLANTS

2014 L. C. SMITH BUILDING, SEATTLE, WASHINGTON

FILED
JUN 2 1935
RECORDED



In the
**United States Circuit Court
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No. 3935

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THE ESTATE OF ALEXANDER BRINDLE,
_DECEASED, APPELLEE

Petition for Rehearing

*To the Honorable Judges of the Circuit Court of
Appeals for the Ninth Circuit:*

The petition of appellants for rehearing in the
above entitled cause, respectfully sets forth and
shows:

POINT I

A Vessel Violating One of the Collision Rules, viz., the Failure to Keep a Proper Look-Out is Presumed to Be at Fault and Must Exonerate Herself.

In the opinion it is said that:

“It is well settled that the absence of a look-out is not material where the presence of one would not have availed to prevent a collision.”

and in keeping with this thought this court has decided that the absence of a look-out made no particular difference in the case at bar. We believe that the court is in error upon the facts for the reason, first, that the evidence discloses that if the master of the “Wildwood” had been looking, he could have seen the “Eagle” long before he did in fact see her. Note this question at page 16 of the brief:

“Q. Yes, but with a moon, now, nearly full and half way up on the horizon, clear night, not obscured, you could see the outline of the ‘Eagle’ on the water some distance away, couldn’t you?”

“A. *If I had been looking over my port bow and watching closely I might have seen it.*”

This with the physical fact that the light-keeper and his wife heard the “Eagle” and observed her

off on the water when she was a half a mile distant or more from the place where the "Wildwood" must have been, indicates clearly that the failure to keep the kind of look-out required by law on the part of the "Wildwood" had as much to do with the collision as the corresponding negligence on the part of the "Eagle" in running without lights. How can this court say that her failure to keep a look-out did not contribute to the result in view of the admission of the "Wildwood's" master? He could have seen that there was a vessel and that it was moving towards him. Can this situation be distinguished from the one in the case of *Eastern Dredging Company v. Winnisimmet Company*, 162 Fed. 860. In that case in the lower court, the learned judge thought that although the failure to keep a look-out might have been a fault,

"he did not regard it as an efficient contributing fault. On the other hand, we think that this lack of a proper look-out was a very grave fault, and that the fault did contribute to the collision. The supreme court has been constantly rigid in holding vessels to maintaining look-outs as far forward and as near the water as possible. Especially where the water is dark, with otherwise a fairly clear night, it is important that the look-out should be as near it as possible, in order that his eye may follow

the surface, and thus be in position to detect anything low down which may be approaching. While it may be true that there was no occasion to anticipate that a mud scow would be adrift in the harbor, without lights and without being manned, at that time of the night, various very small crafts, including even rowboats, were to be guarded against as a matter of reasonable and ordinary precaution."

In that case the Circuit Court of Appeals for the first circuit divided the damages, holding that the failure to keep a look-out was a very grave breach of duty, which placed a *prima facie* burden of fault upon the other vessel. We quote as follows from that case:

"Beginning as early as *The Genesee Chief*, 12 How. 443, 463, 13 L. Ed. 1058, which was followed by a continuous line of decisions to the same effect, the supreme court observed as follows:

" 'Whenever a collision happens with a sailing vessel, and it appears that there was no other look-out on board the steamboat but the helmsman, or that such look-out was not stationed in a proper place, or not actually and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault.'

"This, of course, means the fault of the steamer. Applying this rule to this case, it does not seem to be necessary to go further; but, again, in *The Ariadne*, 13 Wall. 475, 478, 20 L. Ed. 542, the opin-

ion of the court referring to the waters near the city of New York, spoke of them as being at all times crowded with shipping, and added:

“The greatest care and caution are necessary. The duty of the look-out is of the highest importance. Upon nothing else does the safety of those concerned so much depend.’

“Again, referring to the attitude of the look-out, the opinion says, on page 479 of 13 Wall. (20 L. Ed. 542) :

“Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated, until she vindicates herself by testimony conclusive to the contrary.’

“These expressions of the supreme court, which under the circumstances render the ferryboat *prima facie* guilty of contributory fault in this case, are in harmony with the views which all of us entertain, namely, that the lack of a look-out on the main deck was a grave fault, and that, with such a look-out, the scow would probably have been seen in season to have avoided her, so that it was a contributory fault in a positive and efficient manner. Therefore we are of the opinion that the damages and costs in the district court should be divided.”

The United States Supreme Court has said that violation of the collision rules creates a *prima facie* case of fault on the part of each of the vessels vio-

lating the rule. In the *Pennsylvania*, 19 Wall. 125, the supreme court said:

“The liability for damages is upon the ship or ships whose fault causes the injury; but when, as in this case a ship at the time of collision is in actual violation of a statutory rule intended to prevent collisions it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, *but that it could not have been.*’

“This rule applies where a proper look-out is not provided:

The *Geo. W. Childs*, 67 Fed. 272.

McCabe v. Old Dom. S. S. Co., 31 Fed. 234.

The *Lyndhurst*, 92 Fed. 681.

The *Beaver*, 197 Fed. 866.

The *Welburt L. Smith*, 217 Fed. 984.”

In a situation of this sort is not the burden upon the “*Wildwood*” to show that her failure to keep a look-out could not have contributed to the collision which immediately followed? The gist of the court’s opinion in the case at bar is that because the fault of the “*Eagle*” was clearly established, the burden of showing that the “*Wildwood*”

was at fault, falls upon the owners of the "Eagle," whereas quite the contrary appears to be the rule in a case where there has been a violation of one of the collision rules. Violation of the rules creates a case of presumed fault which shifts the burden to the violator, requiring him to show that his violation could not have affected the result. In the case at bar the court disregards this principle, and places the burden of showing that the "Wildwood's" failure to keep a look-out, was actually a contributing cause upon the "Eagle" instead of requiring the "Wildwood" to show that her own failure to keep a look-out could not have affected the result. In the Eastern Dredging case, the Circuit Court of Appeals for the First Circuit has followed our reasoning in this case, whereas this court in the instant case rejects this reasoning, and places the burden where it does not belong. So placed, quite a different conclusion follows. The "Wildwood" viewed as a violator of one of the collision rules with the presumption against her, can not under the disclosed facts, show that her failure to keep a look-out did not contribute. On the other hand if no such presumption follows, then the "Eagle" must show that the "Wildwood's" failure did in fact materially affect the final result. If such is the

correct rule of law, it may be that because the fault of the "Eagle" was clearly established that one may speculate upon the result and say that perhaps it would have made no difference, even if the "Wildwood" did not keep a look-out. We respectfully urge that the court in its opinion has not passed upon the question presented in our opening brief in this case.

POINT II

Apportionment of Costs

Upon this point we respectfully urge that the costs should be divided and properly apportioned in view of the record and the efforts on the part of the appellant to minimize the costs of printing on this appeal. We call the court's attention to the appellants' designation to the clerk directing him to print only those parts of the record which touch the question of navigation and mutual fault, expressly deleting those portions of the record pertaining to the amount or allowance of damages. See the printed record at page 300, *et seq.* The court will note at page 301 that appellant relied entirely upon the errors relating to collision liability expressly waiving any errors touching the amount or extent of

the damage award. In other words we were content to accept as the total damages of the case the findings of the district court, to-wit, \$2,006.80. In view of this statement of errors, which we intended to rely upon, we expressly directed the clerk not to print a great deal of the testimony in the case. Respondent, however, was not willing to accept the award of the trial court, but upon the contrary directed the clerk to print at length a great deal of testimony touching the matter of damages. Note appellee's designation at page 307 of the printed record. Inasmuch as the court has not increased the damage award, in its opinion recently filed, we respectfully urge that the appellee should be compelled to pay for that part of the record which she caused to be printed unnecessarily. We refer this court to subdivision 8 of Rule 23 of the General Rules for the Ninth Circuit. We quote particularly the following from subdivision 8 on page 21, to-wit:

“If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clery shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error

or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed such order as to costs may be made as the court shall think proper."

We also call the court's attention to subdivision 5 of Admiralty Rule 4 of this court, viz:

"and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions."

Also section 2:

"All other papers shall be omitted unless otherwise ordered by the judge who heard the cause."

Section 3:

"Where the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal."

These rules are in harmony with Rule 49 of the Revised Rules of the United States Supreme Court, which regulate the contents of the Admiralty record on appeal. The whole purpose of these rules is to prevent the printing of voluminous records not

material to the issue and not necessary for a consideration of the points relied upon in the Appellate Court. We respectfully urge that the printed record in this case is at least 50 per cent larger than it would othwise have been if appellee had been content to accept the damage award of the trial court. Note the following:

Testimony of Alexander Brindle, pages 42-52, both and all inclusive.

Testimony of A. J. Inman, pages 52-74, both and all inclusive.

Testimony of George Thompson, page 74 to the top of page 87, both and all inclusive.

Testimony of A. J. Inman, pages 157-159, both and all inclusive.

Testimony of Carrington C. Keesling, pages 161-179, both and all inclusive.

Testimony of Joseph F. Radenbaugh, pages 182-194, both and all inclusive.

Testimony of James Rasmussen, page 194 to the top of page 204, both and all inclusive.

Testimony of Alexander Brindle, pages 204-205.

Testimony of Carrington C. Keesling, pages 272-273.

Designation by appellee for printing record, pages 307-310, both and all inclusive.

In addition to the extra and unnecessary printed matter in the record, appellee has devoted pages 43 to 50 of his brief to a discussion of the question of damages. The part relating to interest is covered in one paragraph on page 50. The remaining part of appellee's brief was entirely unnecessary. We respectfully urge that this court upon rehearing direct the clerk to properly apportion the cost of printing in this case, to the end that the appellant may be relieved of the burden of unnecessarily printing the parts of the record, which appellee unnecessarily directed the clerk to print.

WHEREFORE your petitioner prays that your honors will grant a rehearing in said cause, and after due consideration reverse the decision heretofore entered and enter a decree dividing the damages in said cause and will apportion the payment of costs as prayed for herein.

WINTER S. MARTIN,
Proctor for Appellants.

CERTIFICATE OF COUNSEL
UNDER RULE 29

I hereby certify that the foregoing petition for rehearing is in my judgment well-founded, and that it is not interposed for delay. This certificate is for the purpose of complying with Rule 29.

WINTER S. MARTIN,
Proctor for Appellants. *WS,*

